No. 06-10119 *** CAPITAL CASE ***

Title: Allen Snyder, Petitioner

v.

Louisiana

Docketed: March 20, 2007

Lower Ct: Supreme Court of Louisiana

Case Nos.: (1998-KA-1078)

Decision Date: September 6, 2006

Rehearing Denied: December 15, 2006

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Mar 14 2007	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 19, 2007)
Apr 18 2007	Order extending time to file response to petition to and including May 21, 2007.
May 17 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the respondent.
May 18 2007	Brief amicus curiae of Louisiana Association of Criminal Defense Lawyers filed.
May 21 2007	Brief amicus curiae of Cornell Death Penalty Project filed.
May 21 2007	Brief of respondent Louisiana in opposition filed.
Jun 6 2007	DISTRIBUTED for Conference of June 21, 2007.
Jun 8 2007	Reply of petitioner Allen Snyder filed. (Distributed)
Jun 25 2007	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Aug 1 2007	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including September 5, 2007.
Aug 30 2007	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the petitioner.
Sep 5 2007	Joint appendix filed. (2 Volumes) (Statement of costs received)
Sep 5 2007	Brief of petitioner Allen Snyder filed.
Sep 5 2007	Brief amicus curiae of Constitution Project filed.
Sep 5 2007	Brief amici curiae of Nine Jefferson Parish Ministers filed.
Sep 13 2007	The time within which to file respondent's brief on the merits is extended to and including November 5, 2007.
Oct 12 2007	CIRCULATED.
Oct 15 2007	SET FOR ARGUMENT Tuesday, December 4, 2007.
Nov 5 2007	Brief of respondent Louisiana filed. (Distributed)
Nov 26 2007	Reply of petitioner Allen Snyder filed. (Distributed)
Nov 28 2007	Record received from Supreme Court of Louisiana. (1 box)
Dec 4 2007	Argued. For petitioner: Stephen B. Bright, Atlanta, Ga. For respondent: Terry M. Boudreaux, Assistant Attorney General, Gretna, La.

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(9)

No. 06-10119 3-14-07

IN THE

SUPREME COURT OF THE UNITED STATES

ALLEN SNYDER
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF *CERTIORARI*

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Allen Snyder, a black man, was convicted and sentenced to death by an all-white jury in Jefferson Parish, Louisiana, for the fatal stabbing of his wife's male companion. Prior to trial, the prosecutor reported to the media that this was his "O.J. Simpson case." At trial, the prosecutor peremptorily struck all five African Americans who had survived cause challenges and then, over objection, urged the resulting all-white jury to impose death because this case was like the O.J. Simpson case, where the defendant "got away with it." On initial review, a majority of the Louisiana Supreme Court ignored probative evidence of discriminatory intent, including the prosecutor's O.J. Simpson remarks and argument, and denied Mr. Snyder's *Batson* claims by a 5-2 vote.

This Court directed the court below to reconsider Mr. Snyder's *Batson* claims in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005). *See Snyder v. Louisiana*, 545 U.S. 1137 (2005). On remand, a bare majority adhered to its prior holding, once again disregarding substantial evidence establishing discriminatory intent, including the prosecutor's references to the O.J. Simpson case, the totality of strikes against African-American jurors, and evidence showing a pattern of practice of race-based peremptory challenges by the prosecutor's office. In addition, the majority imposed a new and higher burden on Mr. Snyder, asserting that *Rice v. Collins*, 546 U.S. 333 (2006), permitted reversal only if "a reasonable factfinder [would] necessarily conclude the prosecutor lied" about the reasons for his strikes. Three justices, including the author of the original opinion, dissented, finding the prosecutor's reference to the O.J. Simpson case in argument to an all-white jury, made "against a backdrop of the issues of race and prejudice," supported the conclusion that the State improperly exercised peremptory strikes in a racially discriminatory fashion.

The Louisiana Supreme Court's consideration of Mr. Snyder's *Batson* claims on remand from this Court raises the following important questions:

1. Did the majority below ignore the plain import of *Miller-El* by failing to consider highly probative evidence of discriminatory intent, including the prosecutor's repeated comparisons of this case to the O.J. Simpson case, the prosecutor's use of peremptory challenges to purge all African Americans from the jury, the prosecutor's disparate questioning of white and black prospective jurors, and documented evidence of a pattern of practice by the prosecutor's office to dilute minority presence in petit juries?

2. Did the majority err when, in order to shore up its holding that Mr. Snyder had failed to prove discriminatory intent, it imported into a direct appeal case the standard of review this Court applied in *Rice v. Collins*, an AEDPA habeas case?

3. Did the majority err in refusing to consider the prosecutor's first two suspicious strikes on the ground that defense counsel's failure to object could not constitute ineffective assistance of counsel because *Batson* error does not render the trial unfair or the verdict suspect – *i.e.*, that failure to raise a *Batson* objection can never result in prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) – a holding directly conflicting with decisions from *inter alia* the Third Circuit Court of Appeals and the Alabama and Mississippi Supreme Courts?

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner, Allen Snyder, respectfully petitions this Court to review the decision of the Louisiana Supreme Court.

INTRODUCTION

Following this Court's order remanding Mr. Snyder's case for reconsideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005), a bare majority of the Louisiana Supreme Court once again rejected Mr. Snyder's *Batson* claim. *State v. Snyder*, 942 So. 2d 484 (La. 2006). The majority construed this Court's remand not as a rejection of the analysis performed in its initial decision, but "as a mere expansion of our review . . . ." *Id.* at 495. Rather than expanding its review, however, the majority actually constricted it, relying extensively on its earlier analysis of the *Batson* issue, once again ignoring probative evidence of the prosecutor's discriminatory intent, and imposing a higher burden of proof in this direct appeal case, which the majority imported from the analysis applied in *Rice v. Collins*, 546 U.S. 333 (2006), a habeas proceeding governed by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). The majority's decision to affirm the conviction and death sentence so conflicts with the decision and analysis of *Miller-El* that this Court's intervention under Supreme Court Rule 10(c) is required.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court in *State v. Snyder*, 942 So. 2d 484 (La. 2006) (*Snyder III*) (attached as Appendix A hereto), consists of a majority opinion affirming the conviction and death sentence authored by Justice Weimer, a dissenting opinion authored by Justice Kimball and joined by Chief Justice Calogero, and a dissenting opinion authored by Justice Johnson. The unpublished order of the Louisiana Supreme Court denying rehearing on December 15, 2006, is

attached as Appendix B hereto.

JURISDICTIONAL STATEMENT

Following this Court's remand in *Snyder v. Louisiana*, 545 U.S. 1137 (2005), a majority of the Louisiana Supreme Court, on September 6, 2006, once again affirmed Mr. Snyder's conviction and death sentence. Mr. Snyder's timely Application for Rehearing was denied on December 15, 2006. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . and to have the Assistance of Counsel for his defence.*

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> *[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

STATEMENT OF THE CASE

A. Proceedings Below

Mr. Snyder was indicted by a Jefferson Parish, Louisiana grand jury on September 14, 1995, for the first degree murder of Howard Wilson. Jury selection began on August 27, 1996, and the guilt-innocence phase of the trial commenced on August 28, 1996. On August 29, 1996, the jury returned a verdict finding Mr. Snyder guilty of first degree murder. The sentencing phase of the trial began and ended the following day, resulting in the jury's unanimous decision to sentence Mr. Snyder to death. Mr. Snyder was formally sentenced to death on August 22, 1997.

The conviction and death sentence were automatically appealed to the Louisiana Supreme Court. On April 14, 1999, the lower court, by a 5-2 vote, conditionally affirmed the conviction and death sentence, but ordered the case remanded to the trial court to address competency issues. *State v. Snyder*, 750 So. 2d 832 (La. 1999) ("*Snyder I*") (Appendix C hereto). Following remand, the Louisiana Supreme Court, on April 14, 2004, upheld the trial court's determination that Mr. Snyder was legally competent to stand trial, and unconditionally affirmed the conviction and death sentence. *State v. Snyder*, 874 So. 739 (La. 2004) ("*Snyder II*").

Mr. Snyder filed a petition for writ of *certiorari* which this Court granted, vacating the Louisiana Supreme Court's judgment, and remanding the case for further consideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005). *Snyder v. Louisiana*, 545 U.S. 1137 (2005).

Following remand, a slender majority of the Louisiana Supreme Court again affirmed the conviction and death sentence. *Snyder III, supra*, 942 So. 2d 484. Three justices dissented. *See id.* at 500-05 (Kimball, J., joined by Calogero, C.J., dissenting); *id.* at 505-09 (Johnson, J., dissenting). The court denied Mr. Snyder's timely application for rehearing, with the three dissenting justices voting to grant rehearing.

B. Statement of Relevant Facts

1. Pre-Trial Publicity and the O.J. Simpson Case

Mr. Snyder was charged with first degree murder in connection with the August 15, 1995, stabbing death of Howard Wilson and the non-fatal stabbing of Mr. Snyder's wife.[1] After Mr.

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[1] The evidence presented at trial showed that, at the time of the offense, Mr. Snyder and his wife of nine years, Mary Snyder, were separated and living apart, but were discussing the possibility of reconciliation, R. 1263. On the day of the offense, Mr. Snyder's wife had rebuffed Mr. Snyder's attempts to speak with her and, that evening, had gone on a date with a married man she had just met, Howard Wilson. R. 1265. At approximately 1:30 a.m., Mr. Wilson drove Mrs. Snyder to the home in which she was staying,

Snyder had been indicted and before the start of trial, the Jefferson Parish prosecutor made numerous statements to the press and public comparing Mr. Snyder's case to the O.J. Simpson case. The defense filed a *Motion in Limine to Preclude the State from Making Reference or Comparison to Other Notorious Prosecutions* seeking to prevent any further such comments by the prosecutor. R. 159-61. As the defense explained:

> References of the kind referred to above serve no purpose other than as an attempt to confuse and prejudice the jury. Surveys conducted since the verdicts in the O.J. Simpson trial have shown consistently that a large majority of white Americans believe the not guilty verdicts were wrong; many indicate that the verdicts have undermined their faith in the entire jury system. To play upon these fears and prejudices to what will doubtless be an overwhelmingly - if not all - white jury deciding a case with admitted similarities is an appeal to racism at worst and vigilante justice at best, and as such is specifically precluded by Louisiana law.

R. 160. The trial court denied the motion after the prosecutor represented that he would not mention the O.J. Simpson case "during the course of the taking of evidence or before the jury in this case." R. 418-19.[2]

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id., where Mr. Snyder was waiting across the street to speak with her. When Mrs. Snyder did not get out of the car for some time, Mr. Snyder approached and opened the car door; a struggle ensued during which Mr. Snyder stabbed both Howard Wilson and Mrs. Snyder with a knife. R. 1242-43. The injuries to Mrs. Snyder were non-fatal, but Mr. Wilson died as a result of his wounds. Later, Mr. Snyder returned to his home, barricaded himself inside and called the police, apparently suicidal. R. 1284. Police responding to the call found him curled up in a fetal position in his home mumbling "they're coming to get me." R. 1162-68.

[2] Following the trial court's denial of Mr. Snyder's motion in limine, the prosecutor apparently continued to make remarks to the media concerning his "O.J. case," forcing the defense to file a *Motion for an Order Prohibiting the Attorneys from Commenting on the Trial to the Media* (R. 179-80). At argument on the motion on August 27, 1996, defense counsel noted that, the day before, she had been asked by a television news reporter to comment "on the second O.J. Simpson case that was scheduled to go to trial in Jefferson Parish today." R. 478. The prosecutor did not disavow these comments, but argued that the sequestered jury would not be exposed to publicity, R. 477, and contended that he had no intention of discussing the case with the media while the trial was in progress, R. 479. The trial court denied the motion. R. 479.

2. Voir Dire

Jury selection began on August 27, 1996, and lasted a total of one and a half days. In panels primarily of fourteen, jurors were first questioned by the prosecutor, then by the defense (with occasional follow-up questioning by the prosecution); cause and peremptory challenges to the jurors in each panel followed the same sequence. Those jurors who were accepted by both parties were sworn in before the next panel was questioned.[3] In this fashion, a jury of twelve was selected from the first six panels of prospective jurors. Two alternates were seated following questioning of the seventh panel.

There were a total of nine African Americans in the pool of eighty-five eligible venire persons from which the twelve-member jury was selected. Four were removed by the State for cause, and the remaining five were peremptorily challenged by the State.[4] The State's peremptory challenges against African-American venire persons were as follows:

a. Gregory Scott

Mr. Scott sat on the second panel. Neither the State nor the defense saw any basis to challenge Mr. Scott for cause following his questioning; however, the State used its second peremptory challenge to remove Mr. Scott from the venire.[5] The defense noted that Mr. Scott was

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[3] At the conclusion of questioning the fourth panel of prospective jurors, the State began back-striking some of the jurors who had initially been accepted by both parties, starting with the back strike of African American Jeffrey Brooks.

[4] The only African-American venire person not stricken by the State, Jacqueline Woods, was in the seventh panel, which was questioned to seat two alternate jurors after the twelve-member jury had already been selected. R. 1126. None of the alternates sat.

[5] Mr. Scott's unremarkable voir dire testimony established that he could consider both the death penalty and a life sentence, R. 786, 828, that his wife's car had been stolen at gunpoint, R. 804, that he could consider insanity and manslaughter if the defense presented evidence consistent with the legal definition, R. 804, 823-24, and that he felt he would want to testify if he were innocent of a crime, R. 818-19. Mr. Scott's

African American, but did not lodge a *Batson* objection. R. 831.

b. Thomas Hawkins

Mr. Hawkins sat on the third panel and was not challenged for cause by either side. Mr. Hawkins, however, was removed by the State's fourth peremptory challenge.[6] The defense noted that Mr. Hawkins was African American, but did not lodge a *Batson* objection. R. 901.

c. Elaine Scott

Ms. Scott sat on the third panel and the State used its sixth peremptory challenge to strike her from the venire. Noting that Ms. Scott was now the third African American subject to a peremptory strike by the State, the defense lodged a formal *Batson* objection. The State responded that its reasons for striking Ms. Scott were that (1) she was "very weak on her ability to consider the imposition of the death penalty" because she used the word "think" in answering the prosecutor's

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feelings about a defendant's right not to testify favored the State. Moreover, the State chose to strike Mr. Scott while accepting several white prospective jurors whose voir dire responses demonstrated attitudes favorable to the defense, *e.g.* seated jurors William Bennett (an emergency room nurse who testified that his experiences with people suffering from mental illness showed that "some of the things people did were because they didn't know that it was wrong," R. 698); Donald Wolfe (who testified that he had previously served on a Jefferson Parish jury that acquitted a defendant of first degree murder, R. 933, and that the burden of proof in a criminal trial is "much much greater" than in a civil proceeding, R. 944); and John Penny (testifying that he had served on a Jefferson Parish jury that acquitted a defendant of second degree murder and returned a manslaughter conviction, R. 977-78, 990).

[6] Mr. Hawkins' voir dire responses did not reveal any obvious reasons for the State's use of a peremptory challenge to remove him. A ship foreman at Shell Oil refinery, who was married and had three children, R. 844, Mr. Hawkins told the prosecutor that he could consider both the imposition of the death penalty and a life sentence. R. 848, 856. Although Mr. Hawkins expressed confusion during the State's questioning regarding the difference between holding the defense to its burden of proving legal insanity and simply considering an insanity defense, upon subsequent questioning by the defense, he clarified that he would hold the defense to its burden of proof and properly consider the insanity defense. R. 863, 874-875. Otherwise, his testimony was unremarkable. He stated he would not hold a defendant's decision not to testify against him, R. 886, that he had several friends who were Jefferson Parish police officers, R. 877, that he had spent two years in the army, R. 880; and that he would take his responsibilities as a juror very seriously, R. 890.

questions and (2) she was "very positive" about a life sentence. R. 902.[7] The trial court, without appearing to consider whether the State's proffered reasons found support in Ms. Scott's voir dire testimony, overruled the *Batson* objection, stating simply: "All right. I'm going to go ahead and allow the challenge." R. 903-04.

d. Jeffrey Brooks

Mr. Brooks sat on the first panel and was originally accepted by both parties. On the second day of voir dire, the State used its seventh peremptory challenge to backstrike Mr. Brooks, the only African American provisionally accepted at that point. R. 953. The defense lodged a *Batson* objection. In response, the prosecutor stated that he had three reasons he had thought of the previous night, but proceeded to provide only two: (1) that Mr. Brooks "looked very nervous to me throughout his questioning" and (2) that he was a student teacher and therefore "might come back with guilty of a lesser verdict so there wouldn't be a penalty phase."[8] R. 954. Defense counsel countered that the concerns Mr. Brooks had earlier expressed about his student-teaching schedule

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[7] The record does not support the State's proffered reasons for striking Ms. Scott. During death qualification, the first of three questions the prosecutor asked her was whether she could consider imposing the death penalty if Mr. Snyder were found guilty of first degree murder. R. 851. In response, Ms. Scott replied affirmatively, "I think I could." R. 852. Even assuming this response suggested ambivalence about the death penalty, the prosecutor failed to ask any follow-up questions, although the State routinely asked additional questions of white jurors who appeared hesitant about the death penalty, *see, e.g.*, R. 758-61; 786-87; 965–66, or who testified that they could not impose it, *see, e.g.*, R. 636, 752, 753, 754, 787, 849, 852, 921, 966. Moreover, absolutely nowhere does the voir dire transcript reflect what the prosecutor claimed his "notes reflect," *i.e.*, that "she was very positive on when I said about a life sentence, she was very positive on her reason – Her agreement that she could do [a life sentence]." R. 902. In fact, when looking at the prosecutor's questions about jurors' ability to consider a life sentence, it appears not only that Ms. Scott was not "very positive" about a life sentence, but that the question she was answering was whether she could consider the death penalty – to which she responded "I could." R. 859-60. Scott's only other death penalty response – to defense counsel's question about whether she would consider mitigating circumstances – was one word: "Right." R. 895.

[8] The prosecutor explained that a juror might "get smart" and decide to return a second degree murder conviction in order to avoid a penalty phase. R. 955.

had been allayed when the dean of his program assured the trial court that the trial would not interfere with his school work, and that Mr. Brooks looked no more nervous than anyone else in the venire.[9] R. 955-56. Without articulating any basis for its decision, the trial court overruled the *Batson* objection, stating: "All right. I'm going to allow the challenge. I'm going to allow the challenge." R. 956.

e. Loretta Walker

Ms. Walker sat on the fourth panel. The State used its eighth peremptory strike against Ms. Walker, its third straight against an African American. The defense again objected to the State's challenge based on *Batson*. The State argued that its reason for striking Ms. Walker was that she could only impose the death penalty under limited circumstances. R. 958. The trial court overruled the defense's objection and allowed the removal of Ms. Walker, stating: "All right. The Court is going to allow the challenge." R. 959.

As a result of the State's challenges, all twelve empaneled jurors who convicted Mr. Snyder and sentenced him to death were white.

3. The Trial

The guilt phase of the trial began on August 28, 1996, and finished the following day with the jury's verdict finding Mr. Snyder guilty of first degree murder. Substantial evidence established

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[9] The prosecutor did not question Brooks at all regarding the impact of his schedule on his service after the dean of the education program assured the court that the trial would not interfere with Brooks's ability to complete his studies and Brooks accepted this position. R. 551-52. Moreover, the prosecutor expressed no concerns about the scheduling conflicts to which white prospective jurors Arthur Yaeger (seated as Juror No. 9), Michael Sandras and Kelly McMurray testified. *See* R. 507-08, 982, 983, *see also Snyder III*, 942 So. 2d at 501-04 (Kimball, J., dissenting). Further, the trial court did not express any opinion about whether Brooks appeared "nervous," in the face of defense counsel's argument that he appeared no more nervous than anyone else, R. 956, and, as Justice Kimball observed in her dissenting opinion, the record, to the contrary, "seems to indicate that Mr. Brooks was an engaged and voluble juror throughout voir dire examination." *Id.* at 502 (Kimball, J., dissenting).

both that Mr. Snyder acted in the heat of passion upon finding his wife, in the early hours of the morning, in a car with another man and that his wife's previous infidelity had led to a noticeable deterioration in his mental and physical state during the weeks prior to the crime. Despite this, Mr. Snyder's all-white jury failed to give meaningful consideration to his manslaughter defense, returning with a verdict of guilty of first degree murder within forty-eight minutes of retiring for deliberations. R. 1363, 1366.

The sentencing phase of the trial began and ended on August 30, 1996. During rebuttal closing argument, the prosecutor urged the jury to sentence Mr. Snyder to death because O.J. Simpson "got away with it":

> [Defense counsel] tried to describe this man as being the man who – And it was 12 hours later when he called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of –
>
> [Trial court overrules defenses objection.]
>
> The most famous murder case, and all of you all have heard about it, happened in California *very, very, very similar to this case.* The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, *he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that was what that man was thinking about when he called in and claimed that he was going to kill himself?*

R. 1591-93 (emphasis supplied).[10] After two and a half hours of deliberations, the jury returned with a sentence of death. R. 1598.

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[10] The prosecutor's O.J. Simpson argument was not even plausible. At the time of the crime, Mr. Snyder could not possibly have been thinking of O.J. Simpson's acquittal, as the O.J. Simpson verdict was returned nearly two months later, on October 3, 1995. *See, e.g.*, Martin Gottlieb, *Not Guilty: the Racial Prism; Racial Split at the End, as at the Start,* THE NEW YORK TIMES, 10/4/05; John Pope, *Some in N.O. Elated, Some Stunned,* THE TIMES PICAYUNE, 10/4/05, at A4.

4. Mr. Snyder's Motion for New Trial

Mr. Snyder filed a motion for new trial, arguing, *inter alia*, that the trial court's erroneous *Batson* rulings required vacation of the conviction and death sentence.[11] R. 199-201. During argument on the motion, conducted August 22, 1997, defense counsel observed that the prosecutor's O.J. Simpson argument could not have been made, but for the fact that the State had secured an all-white jury in this matter. Defense counsel contended that "[t]he prosecutor had maneuvered the jury around to where it was all white," because "it's kind of hard to say things about a black defendant when there's one or two blacks on the jury," R. 1618, and stressed the racially divisive nature of the prosecutor's O.J. Simpson argument:

> [Y]ou'd have to be in a cave for the last couple of years to not know, and the prosecutor knew exactly what he was doing, to not know that most white people, this was an all white jury, believed that O.J. Simpson was guilty as hell, and that he was getting away with murder, you know. And it's outrageous for the prosecutor to analogize to that case, to this case, which has nothing to do with it . . . [a]nd to hammer this man down, and to get a jury to say, That's right, you know, O.J. Simpson got off, this guy is trying to get off, he's like O.J. Simpson, you know, but we weren't on that jury in California, but we're on a jury here, we can do something about it. And that's totally outrageous.

R. 1617-18. The trial court denied the motion for new trial, R. 1625, and, a few minutes later, formally sentenced Mr. Snyder to death, R. 1627.

C. The Louisiana Supreme Court's Initial Opinion Addressing the *Batson* Claims

Mr. Snyder's first degree murder conviction and death sentence were automatically appealed to the Louisiana Supreme Court. In a fractured decision, a majority of the court conditionally

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[11] During pretrial proceedings and at trial, Mr. Snyder was represented by the public defender's office. Following the jury's verdicts, Mr. Snyder's family retained new counsel, who represented Mr. Snyder from the Motion for New Trial through the denial of rehearing in *Snyder II*. Undersigned counsel's office, the Capital Appeals Project, undertook representation of Mr. Snyder following the denial of rehearing.

affirmed Mr. Snyder's conviction and death sentence, but remanded for a hearing to address whether Mr. Snyder had been competent at the time of trial. *See Snyder I*, *supra*, 750 So. 2d 832.

With respect to Mr. Snyder's claim that the prosecutor exercised peremptory challenges on the impermissible basis of race, a majority of the Louisiana Supreme Court acknowledged that "[t]he prosecutor used peremptory challenges to strike every African American called as a prospective juror who survived challenges for cause. This resulted in an all-white jury for the defendant, who is African American." *Id.* at 839. Despite this finding, the majority deferred to the trial court's unblinking acceptance of the prosecutor's proffered race-neutral reasons and upheld the trial court's denial of Mr. Snyder's *Batson* challenges. *Id.* at 842.

In so doing, the majority gave short shrift to compelling evidence that the prosecutor had intentionally discriminated on the basis of race in exercising his peremptory challenges. Not only did it pay little heed to the fact that the prosecutor struck every single African American who had survived cause challenges, the majority did not consider direct evidence that, before trial, the prosecutor had evinced the intent to inject the issue of race into the proceedings by proclaiming that this case was like the racially polarizing O.J. Simpson case, and that, during trial, this intent was realized when the prosecutor, in penalty phase closing argument, actually played the O.J. Simpson card. As Justices Lemmon and Johnson concluded, in separate dissenting opinions, "the prosecutor's intention to utilize racial bias became crystal clear when he commented during closing argument in the penalty phase that O.J. Simpson 'got away with it.'" *Id.* at 864 (Lemmon, J., concurring and dissenting in part); *see also id.* at 866 (Johnson J., dissenting) ("The prosecutor utilized the O. J. Simpson verdict to racially inflame the jury's passion to sentence this defendant to death. Such tactics leave no doubt in my mind that the prosecutor had a racially discriminatory purpose for

excluding the African-American jurors.").[12]

The Louisiana Supreme Court also refused to consider the prosecutor's use of peremptory challenges to remove the first two African Americans in the venire on grounds that defense counsel had failed to raise *Batson* objections to these strikes. On appeal, Mr. Snyder urged that his trial counsel were ineffective in failing to object under *Batson*. The Louisiana Supreme Court, however, held that because a *Batson* violation does not "render the trial unfair or verdict suspect," it cannot result in prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), and, accordingly, such error cannot establish that counsel was ineffective.

D. <u>This Court's Order Remanding the Case</u>

At the time Mr. Snyder first sought review in this Court, following the Louisiana Supreme Court's decision unconditionally affirming the conviction and death sentence in *Snyder II*, the case of *Miller-El v. Dretke*, was pending before this Court. *See Miller-El v. Dretke*, 542 U.S. 936 (2004) (granting petition for writ of *certiorari*). Two weeks after this Court granted relief in *Miller-El*, *supra*, 545 U.S. 231, it granted Mr. Snyder's petition, vacated the Louisiana Supreme Court's judgment, and remanded the case for further consideration in light of *Miller-El*. *Snyder v. Louisiana*, 545 U.S. 1137 (2005).

E. <u>Proceedings Following Remand</u>

The Louisiana Supreme Court ordered additional briefing. In his *Brief upon Remand from the Supreme Court of the United States* ("*Brief upon Remand*"), Mr. Snyder presented the following

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[12] The court did address the prosecutor's prejudicial O.J. Simpson case comparisons in a separate section of its opinion, but ruled that the prosecutor's argument, even if improper, did not require reversal of the death sentence because the court was not "firmly convinced" that the comments influenced the jury or contributed to the verdict. *Id.* at 846.

evidence to prove that the prosecutor's proffered race-neutral reasons for striking African-American jurors were pretextual and that the prosecutor had instead struck these jurors because of their race:

- **Statistics:** Mr. Snyder pointed out in his brief that the prosecutor had seated an all-white jury by using close to half of his peremptory strikes to exclude the five eligible African-American prospective jurors, a group comprising only 14% of the qualified pool (five out of thirty-six). The State used its strikes to challenge 100% of the qualified African-American prospective jurors, while using peremptory challenges on only 23% of the qualified white prospective jurors (7 out of 31). The State thus struck African Americans at more than four times the rate of white prospective jurors. *See Brief upon Remand* at 14-16.

- **Careful Scrutiny of the Voir Dire Record, Including Side-by-Side Comparisons of Stricken African-American Jurors with Accepted White Jurors:** As Mr. Snyder argued, several of the prosecutor's proffered reasons for striking Jeffrey Brooks and Elaine Scott lack actual record support, thus belying their credibility. Moreover, a comparison of these jurors with white venire members accepted by the State similarly reveals that the race-neutral reasons proffered by the prosecutor were pretextual and that race was the determining factor in who was challenged and who was not. In addition, the prosecutor's strike of prospective jurors Gregory Scott and Thomas Hawkins (for which no race neutral reasons were proffered) appear unexplainable from the record, as their voir dire testimony showed them to be jurors more favorable to the State than several white jurors who were accepted by the State. *See Brief upon Remand* at 16-29.

- **Broader Patterns of Discriminatory Practice by Both Mr. Snyder's Prosecutors and the Jefferson Parish District Attorney's Office:** In his *Brief upon Remand*, Mr. Snyder argued that the prosecutor's invidious intent in striking African-American jurors was presaged by his pretrial comparisons of this case to the O.J. Simpson case and – before the all-white jury crafted from the prosecutor's use of peremptory challenges – came to fruition in the prosecutor's rebuttal closing argument that Mr. Snyder should receive the death penalty because his case was like O.J. Simpson's, where the defendant "got away with it." In addition, the pattern of practice in the Jefferson Parish District Attorney's Office clearly evinced that race discrimination is routine in that parish, as reflected in cases previously decided by the Louisiana Supreme Court;[13] a statistical analysis conducted in another Jefferson Parish case by

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[13] *See State v. Harris*, 820 So.2d 471, 474 (La. 2002) (finding *Batson* violation where Jefferson Parish prosecutor explained that she was striking African-American juror because he was a "single black male on the panel with no children . . . . I don't want him relating to the defendant more so than he would the State's part of the case"); *State v. Jacobs*, 789 So. 2d 1280 (La. 2001) (though reversing on other grounds, court rebuked the same judge who presided over Mr. Snyder's trial for the careless manner in which the

a Tulane University professor, who concluded that the racial disparity in the state's use of peremptory challenges strongly supports the claim that the Jefferson Parish District Attorney's Office engages in racially discriminatory jury selection practices;[14] and a climate of racial insensitivity illustrated by prosecutors' wearing of hanging-noose neckties in trial proceedings against African-American defendant Lawrence Jacob.[15] *See Brief upon Remand* at 29-38.

F. The Majority Opinion of the Louisiana Supreme Court

Although a slim majority of the Louisiana Supreme Court acknowledged the requirement that it review Mr. Snyder's "*Batson* complaints cumulatively in light of the entire record as directed by *Miller-El*," *Snyder III*, 942 So.2d at 486,[16] it actually refused to consider most of the evidence outlined above. Rather, the majority concluded that *Miller-El*, and this Court's decision in *Rice v.*

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judge considered the defendant's *Batson* challenges); *State v. Myers*, 761 So. 2d 498 (La. 2000) (reversing on grounds the trial court erred in failing to address the defendant's *Batson* challenges to the State's use of peremptory challenges to exclude six of seven African Americans). *See also State v. Bridgewater*, 823 So.2d 877 (La. 2002) (all-white jury seated after prosecutor used peremptory strikes to remove prospective black jurors); *State v. Neal*, 796 So.2d 649 (La. 2001) (prosecutor used strikes to remove three African Americans; one African American seated on jury); *State v. Taylor*, 781 So.2d 1205 (La. 2001) (prosecutor struck five African Americans, leaving one on jury); *State v. Lucky*, 755 So.2d 845 (La. 1999) (entire panel of jurors struck when juror accused prosecutor of using challenges to remove African-American women; resulting jury consisted of eleven whites and one black)(information regarding jury composition obtained from post-conviction investigator); *State v. Seals*, 684 So.2d 368 (La. 1996) (all-white jury seated after the prosecutor struck three African Americans over defendant's *Batson* objection); *State v. Durham*, 673 So.2d 1103 (La. Ct. App. 1996) (same).

[14] This study had been introduced into the trial court record following the Louisiana Supreme Court's reversal on *Batson* grounds in *State v. Harris*, *supra*, 820 So. 2d 471, and was included as an appendix in the writ application to the Louisiana Supreme Court in *State v. Harris*, Sup. Ct. No. 03-KK-3549.

[15] *See, e.g.*, Jeffrey Gettleman, *Prosecutors' Morbid Neckties Stir Criticism*, THE NEW YORK TIMES, 1/5/03, Section 1; Joe Darby, *Prosecutors' Choice of Neckties Blasted; Noose, Grim Reaper Worn in Murder Case*, THE TIMES PICAYUNE, 1/5/03.

[16] The majority initially engaged in a discussion of this Court's so-called "pendulous treatment" of the issue of race-based peremptory challenges, *Snyder III*, *supra*, 942 So. 2d at 487, describing this Court's analysis of the issue in *Swain v. Alabama*, 380 U.S. 202 (1965), *Snyder III*, *supra*, 942 So. 2d at 487-88, and characterizing *Batson* as the Court's "pendulum swing in the opposite direction," *id.* at 488, and *Miller-El* as "mov[ing] the pendulum back toward middle ground," *id.*

Collins, 546 U.S. 333 (2006), "do not require a detailed reconsideration of the voir dire of the five African-American prospective jurors peremptorily struck by the State." *Id.* at 492. As set forth below, the majority

- refused to consider any evidence relating to the pattern of practice in Jefferson Parish on grounds it was outside the appellate record;
- rejected any consideration of the statistical pattern raised by the prosecutor's use of peremptory challenges to strike 100% of the qualified African Americans, by whittling down its consideration of the strikes to analysis of the removal of only two prospective jurors;
- disregarded entirely the evidence revealing the pretextual nature of the prosecutor's reason for striking Elaine Scott; and
- dismissed as irrelevant the prosecutor's pretrial comments and penalty phase closing argument about O.J. Simpson because, "in context" the references were appropriate and "[n]either remark referred to Simpson's or Snyder's race," *Snyder III*, 942 So. 2d at 499.

In lieu of considering the evidence Mr. Snyder had assembled to establish proof of intentional discrimination, the majority once again deferred to the trial court's rejection of Mr. Snyder's *Batson* challenges – even though this entailed deference to the unexplained ruling of a trial judge the Louisiana Supreme Court had chastised for his careless treatment of *Batson* challenges during a 1998 capital trial[17] and acceptance of race neutral reasons offered by a prosecutor whose credibility was far from untarnished.[18]

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[17] *See State v. Jacobs*, 789 So. 2d 1280,1283, n.2 (La. 2001).

[18] Jim Williams, the lead prosecutor in this case, was one of the trial prosecutors in both *State v. Kyles*, 513 So. 2d 265 (La. 1987), and *State v. Thompson*, 516 So. 2d 349 (La. 1987) – both capital cases arising in Orleans Parish that were ultimately reversed on grounds the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), in failing to disclose exculpatory evidence. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *State v. Thompson*, 825 So. 2d 552 (La. App. 2002), *writ denied*, 829 So. 2d 427 (La. 2002).

Initially, the majority quickly dispatched the evidence Mr. Snyder had presented of the history of race discrimination in Jefferson Parish on grounds such evidence "would take us outside the four corners of the appellate record . . . ." *Id.* at 490 n. 8.[19] Accordingly, although the majority recognized that *Miller-El* cautioned that *Swain*'s focus on a prosecutor's historical use of peremptory challenges "should not have been consigned to history," *id.* at 488, it consigned the historical context of the prosecutor's actions in this case to the trash bin – even though much of the evidence arose from decisional law the Louisiana Supreme Court had itself issued (and which it routinely cites as precedent).

The majority, moreover, removed from its consideration for any purpose the prosecutor's use of peremptory challenges against three of the five African-American jurors, observing that "[t]he court's current task is eased by the winnowing out of some of the challenged jurors." The majority concluded it need not consider the strike of Loretta Walker for any purpose because Mr. Snyder, in the *Brief upon Remand*, did not raise arguments specifically addressing her removal. The majority also disregarded the prosecutor's strikes against Greg Scott and Thomas Hawkins for the reason set forth in its initial opinion – that any challenge to the prosecutor's use of peremptory challenges against these jurors had been waived by trial counsels' failure to raise *Batson* objections to their removal.[20] In assessing the evidence of discrimination, the court thus failed to consider either the

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[19] The majority's conclusion that evidence of the pattern of practice by Jefferson Parish prosecutors was "dehors the record," *id.*, disregarded the import of defense counsel's argument, at the pretrial hearing conducted on the motion in limine to preclude the prosecutor from comparing this case to O.J. Simpson's, that "[t]o play upon these fears and prejudices to what will doubtless be an overwhelmingly - if not all - white jury deciding a case with admitted similarities is an appeal to racism at worst and vigilante justice at best, and as such is specifically precluded by Louisiana law." R. 160.

[20] The majority observed that "[t]here is nothing in *Miller-El* or *Collins* that casts doubt on the correctness of this portion of *Snyder I*." *Id.* at 493. It further approved its initial holding that trial counsels' failure to object to the removal of Scott and Hawkins could not constitute ineffective assistance of counsel

statistical import of the prosecutor's use of peremptory challenges to remove *every* qualified African-American juror, or the significance of the prosecutor's acceptance of white jurors who appear, from the record, to have been less favorable to the State than Thomas Hawkins and Greg Scott.

Having whittled the issue down to two jurors, the majority proceeded to adopt its original decision; it noted that "[d]espite defense counsel's *reiteration* of the argument concerning the remaining two potential jurors, we turn to our previous decision regarding these persons," *id.* at 493 (emphasis supplied),[21] and then quoted extensively from its earlier opinion, *see id.* at 493-95 (quoting *Snyder I, supra*, 750 So. 2d at 840-42). Thereafter, the majority observed, "we . . . find nothing [in the voir dire transcript] to disparage the above quoted *Batson* analysis conducted by this court in *Snyder I*." *Id.* at 494.

Noting that "the peremptory challenge of Brooks requires a more detailed discussion than the challenge of Scott," the majority additionally addressed Mr. Snyder's post-remand argument that the prosecutor's reasons for striking Jeffrey Brooks were pretextual. It dismissed Mr. Snyder's comparative juror analysis of the prosecutor's claim that he struck Brooks because of his student teaching schedule, reasoning that the scheduling conflicts identified by prospective juror Sandras and seated juror Yaeger were distinguishable because, unlike Brooks, "both of these men were employed

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under *Strickland v. Washington*, 466 U.S. 668 (1984), "because the State's exclusion of Scott and Hawkins did not directly and fundamentally impact the integrity of the fact-finding process at trial." *Id.* at 493 n.13 (citing *Snyder I*, 750 So.2d at 842).

[21] Mr. Snyder's 38-page *Brief upon Remand* was not simply a "reiteration" of the *Batson* arguments initially raised in this case. Rather, its discussion of the issue was largely informed by the guidance this Court provided in *Miller-El*. The original brief, which was filed May 20, 1998, devoted six and a half pages to the *Batson* issue and did not, for instance, present a close analysis of the voir dire transcript or document the disparate treatment of African-American jurors *vis a vis* similarly situated white jurors.

and apparently already had established careers,"[22] *id.* at 496, and that McMurray's concerns with service were focused on childcare problems, rather than her court-reporting classes at Franklin College, *id.* at 496 n.16.[23] The majority also rejected Mr. Snyder's argument that the prosecutor's explanation that he struck Brooks because he appeared "very nervous" was belied by the absence of any confirmation by the trial judge, coupled with the engaged responses Brooks provided to questions from both parties. The majority reasoned that "the fact that Brooks was articulate during the voir dire may have contributed to the prosecutor's fear that he would get 'smart' during jury deliberation and suggest a verdict lesser than the death penalty," and that, because "nervousness cannot be shown from a cold transcript, . . . the judge's evaluation must be given much deference." *Id.* at 496.

Finally, the majority dismissed as irrelevant the prosecutor's pretrial comments and penalty phase argument comparing this case to the O.J. Simpson case. The majority did not even

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[22] Prospective juror Michael Sandras, a white male in the fifth panel, reported that he taught at the University of New Orleans and had "just started yesterday and it's the beginning of the semester; so any prolonged absence, it becomes a real problem." R. 982. He admitted that concern about his teaching obligations would cause him to have trouble concentrating and that he would "have to somehow pass on the information concerning work." *Id.* Despite Mr. Sandras' admitted concerns, the State never asked him a single question concerning his commitments and the extent to which he would be distracted or want to end the trial quickly by avoiding a penalty phase in order to "go home quickly." In fact, unlike for Mr. Brooks, there was not even a phone call made to the university to determine if Mr. Sandras could arrange to have his commitments covered.

White prospective juror Arthur Yaeger, also in the fifth panel, expressed concern with jury service because he had "a longstanding commitment to an event that's going to take place on Sunday that I've been an integral part of for many years." R. 983. The prosecutor did not question Mr. Yaeger about this and lodged no challenge against him. Rather, he was accepted by the State and sat on the jury.

[23] The majority as well dredged up questions the prosecutor had posed to a few jurors who had expressed scheduling problems to bolster the legitimacy of the prosecutor's concerns with Brooks' teaching obligations, *id.* at 495, even though the prosecutor did not ask Brooks a single question about the impact of his schedule on his ability to serve as a juror.

acknowledge the prosecutor's pretrial comments to the media comparing this case to O.J. Simpson's or Mr. Snyder's two motions seeking to quell such comments. *See supra*, at 3-4. Instead, it identified as the only example of the prosecutor's pretrial remarks his argument at a hearing conducted July 29, 1996, where the prosecutor had alluded to the case to support the admissibility of other crimes evidence. *See id.* at 497, R. 358. The majority, moreover, characterized the prosecutor's rebuttal phase argument that Mr. Snyder should be put to death because this case was like O.J. Simpson's, where the defendant "got away with it," R. 1593, as a proper response to defense counsel's statement in closing argument that Mr. Snyder had been suicidal when police officers arrived at his home.[24] *Snyder III*, 942 So. 2d at 498-99. The majority concluded that the prosecutor's O.J. Simpson comments did not evince discriminatory intent, observing:

> [O]ther than suggesting inferences to be drawn from the bare facts of the prosecutor's remarks, both prior to and subsequent to the voir dire, defense counsel points to no evidence in the record to substantiate defendant's claim of discriminatory use of peremptory challenges. The inferences defense counsel suggests are no more compelling than other race neutral inferences to be drawn when one considers the prosecutor's remarks in context. The remark at the motion in limine [sic] referred to the fact that the Simpson trial involved alleged domestic violence; the remark during rebuttal referred to the fact that Simpson feigned suicidal intent. *Neither remark referred to Simpson's or Snyder's race.*

Id. at 499 (emphasis supplied).[25]

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[24] As noted, *supra*, p. 9, n. 10, the prosecutor's argument that Mr. Snyder may have had O.J. Simpson's acquittal in mind when he purportedly feigned being suicidal was factually insupportable, as the O.J. Simpson verdict was not announced until close to two months after the offense for which Mr. Snyder had been charged.

[25] The majority further noted that "[c]ounsel's citations to authorities concerning the Simpson trial never were and are not now, part of the record before this court for review." *Id.* The majority presumably referred to published scholarship to which Mr. Snyder cited in his *Brief upon Remand*, *see* p. 31, as support for the argument defense counsel had made before the trial court that "[s]urveys conducted since the verdicts in the O.J. Simpson trial have shown consistently that a large majority of white Americans believe the not guilty verdicts were wrong; many indicate that the verdicts have undermined their faith in the entire jury system." R. 160. *See also* R. 1617-18 (defense counsel's argument at hearing on motion for new trial).

In concluding that Mr. Snyder had failed to prove intentional discrimination, the majority relied on this Court's decision in *Rice v. Collins*, 546 U.S. 333 (2006), a habeas corpus case analyzed under the AEDPA, to conclude that Mr. Snyder was not entitled to relief unless he could "demonstrate that a reasonable factfinder *must necessarily conclude* the prosecutor lied about his reasons for striking Scott or Brooks." *Snyder III, supra*, 942 So. 2d at 499 (emphasis supplied). Holding that Mr. Snyder "did not carry his ultimate burden of persuasion," the majority restated its original holding that "Snyder's 'proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent.'" *Id.* at 500 (quoting *Snyder I*, 740 So. 2d at 842).

G. The Dissenting Views of Three Justices

Three justices, including Justice Kimball, the author of *Snyder I*, dissented in two separate opinions.

Justice Kimball, joined by Chief Justice Calogero, wrote that "a review of the entirety of this record performed using the vigorous analysis directed by the *Miller-El* Court reveals the trial court erred in allowing the State to peremptorily challenge Mr. Brooks." *Id.* at 100 (Kimball, J., dissenting). Justice Kimball initially observed that the "raw numbers," showing that the State used "'close to half' of its peremptory strikes to 'exclude an entire group comprising only fourteen percent of the qualified pool' is compelling evidence that the State's strikes were made on the impermissible basis of race." *Id.* She then noted that the "voir dire began against a backdrop of the issues of race and prejudice when the State made references to the O.J. Simpson's case," and that the prosecutor's pretrial assurances to the trial court "that he would not refer to O.J. Simpson during the voir dire and evidentiary portion of trial . . . appear disingenuous because the prosecutor clearly referenced the O.J.

Simpson case during its rebuttal argument at the penalty phase of trial." *Id.* at 501.

Moving on to address the prosecutor's removal of Jeffrey Brooks, Justice Kimball observed that, in light of the prosecutor's injection of racial issues, "it is only reasonable to conclude that Mr. Brooks was peremptorily challenged by the State on the basis of his race when the entirety of the facts is considered. This is especially true in light of the fact that the trial court did not articulate its reasons for overruling the *Batson* challenge." *Id.* The dissent commented that the State's use of a backstrike to remove Brooks was "suspicious," and that "[t]he suspicions raised by the circumstances surrounding the exercise of the backstrike are not eased when the voir dire of Mr. Brooks is considered alone or when it is considered along with that of other panelists." *Id.*

Justice Kimball proceeded to scrutinize the prosecutor's proffered reasons for striking Brooks in light of the voir dire record. She concluded that the prosecutor's failure to question Brooks about the impact of his teaching schedule on his ability to serve, and apparent lack of concern about the scheduling conflicts of other white prospective jurors, revealed that "there was no pre-strike foreshadowing of genuine State concern over the possibility of Mr. Brooks having time-schedule anxieties [and n]o attempt was made by the State to verify its hypothesis and develop an objective basis for its strike." *Id.* at 502. The dissent further observed that the prosecutor's explanation that it struck Brooks because he appeared "very nervous" lacked any corroboration in the record, in light of the trial court's failure to "verify[] the accuracy of the State's generalized and conclusory characterization" and the record-based indications "that Mr. Brooks was an engaged and voluble juror throughout voir dire examination." *Id.*[26]

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[26] As the dissent observed, "[i]n the absence of the trial court's independent and particularized assessment of Mr. Brooks's demeanor, a reviewing court can only look to the record, which seems to indicate a lack of nervousness and uncertainty on the part of Mr. Brooks." *Id.* at 503 (Kimball, J., dissenting).

Justice Kimball also considered the prosecutor's treatment of similarly situated white jurors. She noted the prosecutor's apparent lack of concern for the scheduling conflicts to which prospective juror Sandras and seated juror Yaeger testified, concluding that "the acknowledged time concerns of Mr. Sandras and Mr. Yaeger seem equally significant as the time concerns attributed to Mr. Brooks" and that "[t]he factor that calls the State's strike of Mr. Brooks into question is the total lack of interest prosecutors exhibited in the admitted time concerns of Mr. Brooks, Mr. Sandras and Mr. Yaeger until it needed to justify with race-neutral reasons its strike of Mr. Brooks." *Id.* at 504.

In conclusion, Justice Kimball observed:

> [T]he totality of the evidence discussed herein, combined with the lack of the trial court's active participation in voir dire and its failure to articulate particularized reasons for its determination that the State's proffered reasons were not pretextual, leads to the conclusion that the trial court's decision to allow the strike of Mr. Brooks was clearly erroneous. In my view, the cumulative evidence of pretext is compelling and too powerful to conclude [that] anything but intentional racial discrimination motivated the State's strike of Mr. Brooks.

Id. at 505.

Justice Johnson filed a separate dissenting opinion. She began by quoting liberally from her initial dissent in *Snyder I*, in which she had stressed that "the prosecutor's action in accepting the first African-American juror [Brooks] seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions," and that "[t]he prosecutor's discriminatory intent in excluding all African-Americans from the jury was evidence by his reference to the O.J. Simpson trial during closing arguments." *Id.* at 506 (quoting *Snyder I*, 750 So. 2d at 866) (Johnson, J., dissenting)). Justice Johnson further observed that the prosecutor's use of a backstrike to remove Brooks in this case paralleled the Texas "jury shuffle" procedure this Court had found so suspicious in *Miller-El*. *Id.* at 508.

REASONS FOR GRANTING THE WRIT

I. The majority's decision to reinstate on remand from this Court its prior rejection of Mr. Snyder's claim that the prosecution had purposefully excluded African Americans from his capital jury in violation of *Batson* so conflicts with the decision and analysis of *Miller-El v. Dretke* that this Court's intervention under Supreme Court Rule 10(c) is required.

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*"), this Court reversed the Fifth Circuit's denial of a certificate of appealability to review Thomas Miller-El's claim that the prosecutors in his capital trial had violated *Batson v. Kentucky*, 476 U.S. 79 (1986). On remand, the Fifth Circuit chose to ignore this Court's guidance regarding the proper analysis of the evidence presented to establish that the state had discriminated on the basis of race in exercising peremptory challenges. *Miller-El v. Dretke*, 361 F.3d 849 (5th Cir. 2004). This Court granted *certiorari* a second time and, following careful consideration of the evidence the Fifth Circuit had either disregarded or misconstrued, reversed. *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*").

Here, a bare majority of the Louisiana Supreme Court displayed comparable recalcitrance after this Court remanded for further consideration of Mr. Snyder's *Batson* claims in light of *Miller-El II*. The majority's decision to follow in the Fifth Circuit's footsteps, rather than to engage in the exacting scrutiny that *Miller-El II* requires, merits the same response from this Court that the Fifth Circuit received. Mr. Snyder respectfully submits that *certiorari* should once again be granted, this time to review the Louisiana Supreme Court's judgment on the merits.[27]

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[27] The case of *Hightower v. Terry*, Sup. Ct. No. 06-06-1209, currently pending before this Court, similarly seeks review of the 11th Circuit's decision to affirm following this Court's remand for further consideration in light of *Miller-El II*. *See Hightower v. Schofield*, 545 U.S. 1124 (2005); *Hightower v. Terry*, 459 F.3d 1067 (11th Cir. 2006).

A. The Louisiana Supreme Court's majority opinion paid lip service to this Court's Order requiring it to reconsider the merits of Mr. Snyder's *Batson* claim in light of *Miller-El v. Dretke* by once again ignoring highly probative evidence that the prosecutor intentionally struck qualified African-American prospective jurors on the basis of their race.

This Court's decision in *Miller-El II* broke no new ground.[28] Instead, the Court undertook to apply *Batson*'s directive that "[i]n deciding if the defendant has carried his burden of persuasion [in proving the prosecutor's discriminatory intent], a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson, supra*, 476 U.S., at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)).[29] In doing so, *Miller-El II* recognized the continuing vitality of *Batson* and provided forceful clarification of the analysis that courts must undertake, pursuant to *Batson*, to determine whether a prosecutor has exercised peremptory challenges on the impermissible basis of race.[30]

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[28] *See, e.g., Boyd v. Newland*, 467 F.3d 1139, 1146 (9th Cir. 2006) (citing *Murphy v. Dretke*, 416 F.3d 427, 439 (5th Cir. 2005)); Amanda S. Hitchcock, *"Deference Does Not by Definition Preclude Relief": The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C.L. Rev. 1328, 1330 (2006).

[29] *Batson* established a tripartite structure for determining whether a prosecutor's exercise of peremptory challenges was impermissibly based on race. Once a defendant presents a *prima facie* case of racial discrimination in the State's exercise of a peremptory challenge, the burden shifts to the State to come forward with a race neutral reason for its strike. The trial court must then "determine if the defendant has established purposeful discrimination." *Batson, supra*, 476 U.S., at 98. This case involves solely the third step of the *Batson* inquiry.

[30] The *Miller-El* Court chastised the Fifth Circuit for its failure to consider all relevant evidence in reviewing the state courts' rejection of Miller El's claim of discrimination in the selection of his jury. The Court specifically clarified that, if *Batson* is to have any teeth at all, it is incumbent upon a reviewing court to consider more than the race-neutrality of the reason proffered to rebut a *prima facie* case of discrimination:

> If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence *Batson's* explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination. 476 U.S., at 96-97, 90 L. Ed. 2d 69, 106 S. Ct. 1712.

In remanding Mr. Snyder's case for further consideration in light of *Miller-El*, this Court accordingly directed more than "a somewhat expanded review of defendant's *Batson* claims"[31] – a review that, in fact, the Louisiana Supreme Court majority did not even undertake. Rather, the remand implicitly repudiated the lower court's initial *Batson* analysis and demanded more than a perfunctory reinstatement, with minor variations, of the Louisiana Supreme Court's original opinion.

In every particular, the Louisiana Supreme Court majority rejected the instruction this Court provided in *Miller-El II*.

In *Miller-El*, this Court commenced its analysis with an examination of the statistics, concluding that the Dallas County prosecutor's use of peremptory strikes to exclude 91% of the eligible African-American venire members was "remarkable" and that "[h]appenstance is unlikely to produce" such a result. *Id.* at 241.[32]

In this case, however, rather than considering as evidence of discriminatory intent that the prosecutor used peremptory challenges to remove *100%* of the qualified black jurors in Mr. Snyder's case, a majority of the Louisiana Supreme Court disregarded the statistics by claiming that only two of the prosecutor's five peremptory strikes against African Americans were properly at issue.[33]

Id. at 240.

[31] *Snyder III*, *supra*, 942 So. 2d at 492.

[32] The Court considered the overall statistics even though it limited its analysis of the prosecutor's peremptory challenges to two of the ten struck jurors, noting that, "while other black members of the venire [were] struck purportedly because of some ambivalence, about the death penalty or their capacity to impose it . . . these are closer calls [and t]here is no need to go into these instances, for the prosecutor's treatment of Fields and Warren supports stronger arguments that *Batson* was violated." *Id.* at 252 n.11.

[33] The majority moreover did not consider as proof of discriminatory intent that the prosecutor had peremptorily struck African Americans Gregory Scott and Thomas Hawkins, even though their voir dire testimony showed them to be jurors more favorable to the State than white jurors the State accepted. Regardless of whether the Louisiana Supreme Court correctly held that trial counsel's failure to raise *Batson*

The *Miller-El II* Court also scrutinized the prosecutor's proffered reasons for challenging two of the stricken African-American jurors in light of the voir dire record. Critical to the Court's analysis were side-by-side comparisons of these African-American venire persons against accepted white venire persons – analysis the Court found "[m]ore powerful than the[] bare statistics." *Id.* The Court explained that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Id.* Whether the state conducted any meaningful voir dire on the purported race-neutral reason, whether the state objected to non-African-American venire persons who shared the complained-of characteristic, and whether the state's proffered reasons found record support were all factors the Court considered in determining the credibility *vel non* of the race-neutral reasons proffered by the state. *See id.* at 2325-32. Based on its scrutiny of the prosecutor's proffered reasons in light of the voir dire record, the Court found compelling bases to conclude that the prosecutor had struck prospective jurors Fields and Warren because of their race. *Id.* at 2329, 2332.

Contrary to *Miller-El II*'s instruction, however, the majority here largely ignored or mischaracterized the record. With respect to prospective juror Elaine Scott, the majority eschewed any meaningful analysis of the voir dire transcript, instead simply adopting verbatim its original

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objections to the removal of these two jurors waived any *Batson* claims as to them, *see infra* at Section II, the majority erred in failing to consider the prosecutor's actions as relevant evidence of discriminatory intent *vis a vis* preserved *Batson* challenges. In *Kesser v. Cambra*, 465 F.3d 351, 369 n.6 (9th Cir. 2006) (en banc), for example, the Ninth Circuit considered the prosecutor's racially biased comments about the removal of a prospective juror, even though a *Batson* challenge to her removal had not been preserved, observing that "[n]evertheless, at least some of [the prosecutor's] testimony about Nakata is relevant here, because it indicates possible racial animus and so lends support to Kesser's argument that the prosecutor employed racial stereotypes throughout the jury selection."

opinion finding that the prosecutor's proffered reasons for striking her were race neutral on their face and deferring to the trial court's unexplained ruling denying the *Batson* challenge. *See Snyder III*, *supra*, 942 So. 2d at 493-95 (quoting *Snyder I*, *supra*, 750 So.2d at 840-42). Although the majority did engage in ostensibly closer scrutiny of the prosecutor's challenge to prospective juror Jeffrey Brooks, it went out of its way to distinguish similarly situated white jurors on the basis of superficial differences the State had not even suggested;[34] dredged up questions the prosecutor had posed to a few jurors about declared hardships as a means of legitimizing one of the prosecutor's proffered reasons for striking Brooks (even though the prosecutor did not ask Brooks single question about the issue); and turned on its head the evidence that Brooks, contrary to the prosecutor's contention, was not "very nervous" by claiming that the record of his "articulate" voir dire responses "may have contributed to the prosecutor's fears that he would 'get smart' during jury deliberation and suggest a verdict less than the death penalty." *Snyder III*, *supra*, 942 So. 2d at 496. The majority further concluded that the prosecutor's description of Brooks's "nervous" affect was unreviewable because "nervousness cannot be shown from a cold transcript"; thus "only the trial judge can evaluate the

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[34] The *Miller-El* Court rejected the dissenting opinion's argument "that there are no white panelists similarly situated to Fields and to panel member Joe Warren because '"[s]imilarly situated" does not mean matching any one of several reasons the prosecution gave for striking a potential juror – it means matching *all* of them.'" *Id.* at 247 n.6 (quoting dissent, 545 U.S., at 291). The Court explained:

> None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. Nothing in the combination of Fields's statements about rehabilitation and his brother's history discredits our grounds for inferring that these purported reasons were pretextual. A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.

Id.

demeanor of the juror and . . . the judge's evaluation must be given great deference." *Id.*[35]

Finally, the *Miller-El* Court bolstered its conclusions by looking to "broader patterns of practice" that evinced discriminatory intent, reviewing not only actions by the prosecutor during the jury selection of the case, but general and systemic patterns of discriminatory practice by the District Attorney's Office itself. *Miller-El II, supra*, 545 U.S., at 253. The Court found that the prosecutor's discriminatory intent was evinced by examples of conduct particular to Miller-El's case, observing that "[t]he prosecution's shuffling of the venire panel, its enquiry into views on the death penalty, its questioning about minimum acceptable sentences: all indicate decisions probably based on race." *Id.* Just as relevant and significant in determining purposeful discrimination, the Court found, was evidence of the history of the Dallas County District Attorney's Office and its specific policy of systematically excluding African Americans from juries. *Id.* at 263-64.

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[35] Although the majority refused to consider the record of Brooks's voir dire testimony to assess the legitimacy of the prosecutor's explanation that Brooks was challenged because he appeared nervous, the Ninth Circuit relied on the voir dire record to scrutinize the prosecutor's justification for striking a juror on grounds she appeared "pretentious" and "self-important," concluding the prosecutor's proffered reason was specious in light of this juror's actual testimony:

> The prosecutor's explanation not only fails a comparative analysis, it is inconsistent with Rindels's own testimony. She did not tout her qualifications, but simply explained matter-of-factly that it would be hard for her to serve because she was "the only qualified individual at my work place to complete an application to HUD" and that the application had an impending due date. As was clear from her written questionnaire, Rindels was the office manager for a tribe and had held that job for twelve years, so it seems quite unlikely that her explanation on the hardship form was mere hubris. *Such intangibles as voice inflection and body language are impossible to judge from a cold transcript, but her answers at the hardship hearing hardly sound "pretentious" or "self-important," and the prosecutor never referred to concerns about the intangibles.* Unlike the teachers in the pool, she did not expound on her irreplaceability or reiterate complaints about leaving work once it was clear that the HUD application would not create a conflict.

Kesser, supra, 465 F.3d at 363 (emphasis supplied).

A majority of the Louisiana Supreme Court, however, rejected such evidence in its entirety. The majority mischaracterized the prosecutor's pretrial and trial references to the O.J. Simpson case as appropriate responses, which carried no indication of racial animus because "[n]either remark referred to Simpson's or Snyder's race." *Snyder III*, 942 So. 2d at 499. It refused to consider, as outside the appellate record, any evidence that the Jefferson Parish District Attorney's Office routinely engaged in the racially biased use of peremptory challenges, even though much of that evidence arose in cases the court itself had decided.

In *Miller-El II*, this Court concluded that the entirety of the evidence of the use of peremptory strikes by the prosecutor, when viewed cumulatively, led in a direction "too powerful to conclude anything but discrimination" against African Americans. *Id.* at 265. As the Court found:

> It blinks reality to deny that the State struck Fields and Warren, included in that 91%, because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.

Id. at 266.

By contrast, a majority of the Louisiana Supreme Court, much like the Fifth Circuit in *Miller-El*, *supra*, 361 F.3d 849, reached the opposite conclusion by systematically erasing from its consideration the evidence that, when viewed cumulatively, so powerfully points in the direction of discrimination. Mr. Snyder respectfully submits that *certiorari* should be granted to correct the Louisiana Supreme Court's misguided application of *Miller-El II*.

B. The Louisiana Supreme Court erred in importing the standard of review applied in the AEDPA habeas proceeding of *Rice v. Collins*, to review Mr. Snyder's *Batson* claim on direct appeal

As a means of bolstering its flawed consideration of the proof evincing the prosecutor's discriminatory intent, a majority of the Louisiana Supreme Court relied on this Court's decision in *Rice v. Collins*, 546 U.S. 333 (2006), to conclude that the trial court's *Batson* findings were unassailable unless "a reasonable factfinder *must necessarily conclude* the prosecutor lied about his reasons for striking Scott or Brooks." *Snyder III*, 942 So.2d at 499 (emphasis supplied). As the majority observed, a finding in Mr. Snyder's favor "would be an improper substitution of this court's evaluation for that of the trial court similar to that struck down in *Collins* . . . ." *Id.* (citing *Collins*, *supra*, 546 U.S., at 973).[36]

The majority erred in importing into this direct appeal case the highly deferential standard of review applied by federal courts to assess state court judgments under the AEDPA. "The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). As the Court explained:

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[36] Earlier in its opinion, the majority observed that in *Collins*:

> The Supreme Court reversed, finding the Court of Appeals had "improperly substituted its evaluation of the record for that of the state trial court." *Collins*, 546 U.S. at _, 126 S. Ct. at 973. The Court found the record did not demonstrate that a *reasonable factfinder must necessarily conclude* the prosecutor lied about his reasons for striking the panelist. *Id.* at 975.
>
> Thus, the most recent admonition by the Supreme Court on jury selection after *Batson* focuses, not on a reviewing court's stringent parsing of a prosecutor's race-neutral reasons to ferret out pretext masking discriminatory intent, but on the leeway a reviewing court must grant a trial court in its evaluation of the credibility of the prosecutor in the third step of the *Batson* analysis.

Id. at 492 (emphasis supplied).

> Direct review is the principal avenue for challenging a conviction. "When the process of direct review – which, if a federal question is involved, includes the right to petition this Court for a writ of *certiorari* – comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials.

Id. (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). In light of this distinction, "'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'" *Id.* at 634 (quoting *United States v. Frady*, 456 U.S. 152, 165 (1982) (internal citation omitted)).

Subsequent to *Brecht*, Congress enacted the AEDPA, which defines the standard of review federal courts must apply in considering state court judgments in habeas corpus proceedings, and precludes relief unless the petitioner establishes that the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d).

As this Court itself acknowledged in *Collins*, the standards for reviewing a *Batson* claim on direct appeal and in federal habeas proceedings are distinct:

> On direct appeal in federal court, the credibility findings a trial court makes in a *Batson* inquiry are reviewed for clear error. . . . Under AEDPA, however, a federal habeas court must find the state-court conclusion "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Thus, a federal habeas court can only grant Collins' petition if it was unreasonable to credit the prosecutor's race-neutral explanation for the *Batson* challenge. State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by "clear and convincing evidence." § 2254(e)(1).

Collins, *supra*, 546 U.S. 333 (citation omitted).[37] Prior to its decision in this case, the Louisiana Supreme Court routinely applied the clearly erroneous standard to third-step *Batson* claims on direct review. *See, e.g.*, *State v. Scott*, 921 So. 2d 904, 944 (La. 2006); *State v. Dunn*, 831 So. 2d 862, 869 (La. 2002); *State v. Tyler*, 723 So. 2d 939, 943 (La. 1998).

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Sawyer v. Whitley*, 505 U.S. 333, 346 n.14 (1992) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), and *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).[38] This standard is less burdensome than one that requires reversal only if a reasonable factfinder would be *compelled* to find error.

Taking its cue from *Collins*, a majority of the Louisiana Supreme Court concluded, in essence, that *Batson* claims are inherently unreviewable, because reversal would constitute an impermissible substitution of the reviewing court's judgment for that of the trial judge. Yet, as the Court stressed in *Miller-El II*, itself a habeas case, even AEDPA's standard, though "demanding[, is] not insatiable; as we said the last time this case was here, '[d]eference does not by definition preclude relief.'" *Miller-El II*, *supra*, 545 U.S., at 240 (quoting *Miller-El I*, *supra*, 537 U.S., at 340). As the standard for reviewing Mr. Snyder's direct appeal claim is less onerous than that applied in

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[37] Although *Collins* referenced the standard for reviewing *Batson* claims on direct appeals in federal courts, which are governed by the standard codified in Fed.R.Civ.P. 52(a), *see, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 145 (1986), the Court in *Hernandez v. New York*, 500 U.S. 352, 369 (1995), itself applied the "clearly erroneous" standard to direct review of a state court's determination of *Batson*'s third-step.

[38] *See, e.g.*, *Hernandez v. Bunge Corp.* 814 So. 2d 783, 793 (La. App. 2002) ("A factual finding is clearly erroneous 'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'") (quoting *Zapata Haynie Corp. v. Arthur*, 980 F.2d 287 (5th Cir. 1992)).

Miller-El and *Collins*, the Louisiana Supreme Court majority's excuse that deference tied its hands rings hollow.

II. The Louisiana Supreme Court erred in holding that trial counsel can never be found ineffective for failing to raise a meritorious *Batson* challenge because *Batson* error does not affect the reliability of the verdict and thus cannot prejudice the defense.

In rejecting consideration of the prosecutor's use of peremptory challenges to remove Greg Scott and Thomas Hawkins, the Louisiana Supreme Court held that any *Batson* challenge to these strikes had been waived and that trial counsels' failure to object could not meet the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984), because *Batson* error "[does] not directly and fundamentally impact the integrity of the fact-finding process at trial." *Snyder III*, *supra*, 942 So. 2d at 493 n.13 (citing *Snyder I*, *supra*, 750 So. 2d at 842)). In so holding, the Louisiana Supreme Court has, in effect, made a determination that no defendant can ever prevail on a claim of ineffective assistance of counsel based on the failure of trial counsel to object under *Batson*, regardless of the merits of the *Batson* challenge.

Whether trial counsel's failure to raise a meritorious *Batson* challenge may constitute ineffective assistance of counsel – i.e. the application of *Strickland*'s prejudice prong to this type of error – is an important question about which courts are in substantial disagreement. In contrast to the Louisiana Supreme Court's decision here, several courts have held that ineffective assistance of counsel claims based on counsel's failure to raise a *Batson* challenge in the trial court are cognizable under either a modified version of *Strickland*'s prejudice prong or by applying a presumption of prejudice, given the structural nature of the error.[39]

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[39] *See, e.g., Gov't of the Virgin Islands v. Forte*, 865 F.2d 59, 64 (3rd Cir. 1989) (holding trial counsel's deficient performance in failing to raise *Batson* objections prejudiced defendant and observing that "[w]hile . . . ordinarily the *Strickland* principles are advanced when the contention is made that the trial

There are sound reasons why *Strickland*'s prejudice prong should not be applied so strictly to claims that trial counsel was ineffective in failing to raise *Batson* objections to the prosecutor's discriminatory exercise of peremptory challenges.

First, for well over a century, this Court has recognized the significant harm that arises when state actors engage in discrimination in violation of the Equal Protection Clause. *See, e.g., Strauder v. West Virginia*, 100 U.S. 303 (1880). As this Court observed more recently, "racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (citing *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)). Jurors who have been excluded because of their race suffer the "stigma or dishonor [that] results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror," *id.* at 410, and "a profound personal humiliation heightened

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cannot be relied upon to have produced a just result, we see no logical reason why they should not be applicable when the defendant was denied a just result on appeal because of the ineffectiveness of his attorney at the trial"); *Davidson v. Gengler*, 852 F. Supp. 782, 783 (W.D.Wis. 1994) ("the correct application of the *Strickland* . . . test for determining prejudice on an ineffective assistance claim is not whether the outcome of the trial would have been different, but to ask whether the results of jury selection process would have been different had a *Batson* objection been made); *Ex parte Yelder*, 575 So.2d 137, 139 (Ala. 1991) (holding that "the failure of trial counsel to make a timely *Batson* objection to a prima facie case of purposeful discrimination by the State in the jury selection process through its use of peremptory challenges is presumptively prejudicial to a defendant."); *Triplett v. State*, 666 So.2d 1356, 1362 (Miss. 1995) (adopting the standard set forth in *Yelder, supra*); *State v. Taylor*, 679 N.W.2d 893, 900 (Wis. App. 2004) ("[I]n order to show prejudice, [defendant] must establish that had trial counsel made the *Batson* objection, there is a 'reasonable probability' that it would have been sustained and the trial court would have taken the appropriate curative action."); *see also Davis v. Sec'y for the Dept. of Corr.*, 341 F.3d 1310, 1316 (11th Cir. 2003) ("when a defendant raises the unusual claim that trial counsel, while efficacious in raising an issue, nonetheless failed to preserve it for appeal, the appropriate prejudice inquiry asks whether there is a reasonable likelihood of a more favorable outcome on appeal had the claim been preserved); *but see Reed v. Norris*, 195 F.3d 1004, 1006 (8th Cir. 1999) ("We find it unnecessary to discuss the reasonableness of counsel's conduct [in failing to pursue *Batson* claim] because, given the overwhelming evidence of Reed's guilt presented at trial, we find that it would be impossible for him to demonstrate prejudice under *Strickland*."); *Batiste v. State*, 888 S.W.2d 9, 15 (Tex. Ct. Crim. App. 1994) ("[W]e do not think failure to preserve *Batson* error so invariably detracts from the fairness of trial as to justify exempting it from the 'prejudice' prong of *Strickland*. The possibility of racial prejudice in the selection of the petit jury affects the adversarial presentation of the case not at all.").

by its public character," *id.* at 413-14. A state's discrimination based on race in the jury selection process "strikes at the fundamental values of our judicial system and our society as a whole" and denies a defendant equal protection of the law in violation of the Fourteenth Amendment. *Rose* v. *Mitchell*, 443 U.S. 545, 556 (1979). In light of this substantial harm, this Court has granted relief under *Batson* without any inquiry into prejudice. *See, e.g., Miller-El II, supra*, 545 U.S. 231; *Powers, supra*, 499 U.S. 400; *Batson, supra*, 476 U.S. 79; *see also Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (conviction does not "cure the taint" of intentional discrimination to exclude African Americans from grand jury and such error requires automatic reversal).[40]

Second, and more important, a literal application of *Strickland*'s prejudice-prong would require "proof and acceptance of the notion that race can be a proxy for juror proclivities, which is the inference that *Batson* explicitly condemns." Note, *Constitutional Law - Equal Protection - Seventh Circuit Denies a Criminal Defendant's Objection to His Counsel's Race-based Peremptory Challenge - United States v. Boyd, 86 F.3d 719 (7th Cir. 1996)*, 110 Harv. L. Rev. 1334, 1337 (1997). As the Eleventh Circuit Court of Appeals has observed:

> [W]e are troubled by the practical implication of [*Strickland*'s prejudice prong] when the alleged deficient performance is failure to raise a *Batson*-type claim at trial or on appeal. How can a petitioner ever demonstrate that the racial make-up of the jury that convicted him affected its verdict? Furthermore, in requiring a petitioner to

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[40] Although this Court has yet to address this specific issue, numerous courts (including the Louisiana Supreme Court) have concluded that *Batson* error is structural in nature and accordingly not amenable to harmless error analysis. *See, e.g., Becht v. United States*, 403 F.3d 541, 547 (8th Cir. 2005) (citing *Neder v. United States*, 527 U.S. 1, 8 (1999)); *United States v. McFerron*, 163 F.3d 952, 956 (6th Cir. 1998) (stating that erroneous combination of second and third steps of Batson which resulted in denial of valid peremptory challenge resulted in structural error and new trial); *Tankleff v. Senkowski*, 135 F. 3d 235, 248 (2nd Cir. 1988) ("Because the effects of racial discrimination during voir dire may persist through the whole course of the trial proceedings, we hold that a *Batson/Powers* claim is a structural error that is not subject to harmless error review." (internal quotes and citations omitted); *Rosa v. Peters*, 36 F.3d 625, 634 n.17 (7th Cir. 1994) (holding that *Batson* violation not "trial error" subject to harmless error analysis) (citation omitted); *State v. Harris*, 820 So. 2d 471, 477 (La. 2002).

> make such a showing, we are asking that he convince us of the very conclusion that *Batson* prohibits: that the race of jurors affects their thinking as jurors. . . .
>
> Perhaps in this context we should follow Supreme Court precedent in cases where racial discrimination has altered the composition of the indicting grand jury by "reversing the conviction . . . without inquiry into whether the defendant was prejudiced in fact by the discrimination."

Eagle v. Linahan, 279 F.3d 926, 943 (11th Cir. 2001). These concerns should give pause in considering how *Strickland*'s ineffective assistance of counsel test should be tailored to accommodate claims that trial counsel's deficient performance resulted in a jury-selection process tainted by race discrimination.[41]

The Louisiana Supreme Court's holding that trial counsel's failure to raise meritorious *Batson* objections can never result in harm contradicts the long-established principle that an equal protection violation in the jury selection process so corrupts the integrity of the proceedings and places fairness in doubt, that any resulting conviction must be reversed. The determination of whether prejudice resulted from deficient performance in failing to raise a *Batson* claim necessarily involves a review of the merits of the *Batson* claim itself. If the *Batson* challenge would have been successful, not only has the defendant's Sixth Amendment right to counsel been abridged, but he has been denied the equal protection of the law. Accordingly, Mr. Snyder respectfully submits that this Court should grant *certiorari* in order to address the appropriate standard for analyzing a claim that trial counsel was ineffective in failing to raise a meritorious challenge to the prosecutor's use of peremptory challenges on the invidious basis of race.

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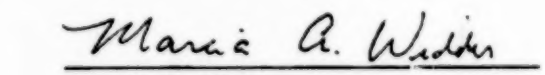
[41] It is ironic that a different outcome would result were a meritorious *Batson* claim waived, not at the trial level, but on appeal. *See, e.g., Bowen v. Foltz*, 763 F.2d 191, 194 (6th Cir. 1985) (restating the prejudice component of *Strickland* to require a showing of a reasonable probability that the result of the appeal would have been different). *Accord Bell v. Lockhart*, 795 F.2d 655, 657-58 (8th Cir. 1986); *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1985); *Schwander v. Blackburn*, 750 F.2d 494, 502 (5th Cir. 1985).

CONCLUSION

For the foregoing reasons, Mr. Snyder respectfully requests that a writ of *certiorari* issue to review the judgment of the Louisiana Supreme Court in this matter.

Respectfully submitted,



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APPENDIX A

Building restrictions are a means of insuring the lasting aesthetic and monetary value of property. They involve a scheme or plan of which all prospective purchasers are aware. *Chambless v. Parker*, 38,276 (La.App. 2 Cir. 3/3/04), 867 So.2d 974, 978; *4626 Corp. v. Merriam*, 329 So.2d 885 (La. App. 1 Cir.), *writ denied*, 332 So.2d 800 (La.1976). A cursory reading of the building restrictions in the present case would have alerted any prospective purchaser that the developer reserved the right to approve any of the subdivision lots for commercial use. In this regard, I further find the majority's reliance on *Oakbrook Civic Ass'n v. Sonnier*, 481 So.2d 1008 (La.1986), misplaced and factually distinguishable. Although this Court approved the use of neighborhood committees to approve certain construction plans in *Oakbrook*, in the present case the Kings reserved to themselves, in the restrictions, the option of granting a variance for commercial use, which reservation clearly negated a finding of a general plan as required by the pertinent provisions of the civil code. This vastly differs from the procedure approved in *Oakbrook*.

For the foregoing reasons, I would affirm the court of appeal on other grounds, dismiss the plaintiffs' action based upon the violation of building restrictions, dissolve the preliminary injunction granted in the trial court, and remand the matter to the trial court for consideration of the issues related to the plaintiffs' contention that they are also entitled to damages and the issuance of an injunction grounded on the law of nuisance.

1998-1078 (La. 9/6/06)

STATE of Louisiana

v.

Allen SNYDER.

No. 1998–KA–1078.

Supreme Court of Louisiana.

Sept. 6, 2006.

Rehearing Denied Dec. 15, 2006.

Background: Defendant was convicted in the Twenty-Fourth Judicial District Court, Parish of Jefferson, No. 98-KA-1078, Kernan A. Hand, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, 750 So.2d 832, conditionally affirmed, and remanded case. On remand, the District Court determined that a retrospective determination of competency was possible and that defendant was, in fact, competent to stand trial. Defendant appealed. The Supreme Court, 874 So.2d 739, affirmed. Granting defendant's petition for a writ of certiorari, the United States Supreme Court vacated the judgment and remanded for further consideration.

Holding: The Supreme Court, Weimer, J., held that defendant failed to carry his ultimate burden of persuasion that the State exercised peremptory challenges in a purposefully discriminatory manner.

Affirmed.

Calogero, C.J., dissented for reasons assigned by Kimball, J.

Kimball, J., dissented and assigned reasons and would grant a rehearing.

Johnson, J., dissented and assigned reasons and would grant a rehearing.

1. Constitutional Law ⇨221(4)

The Equal Protection Clause of the United States Constitution prohibits engaging in purposeful discrimination on the

grounds of race in the exercise of peremptory challenges. U.S.C.A. Const.Amend. 14.

2. Jury ⇐33(5.15)

The race-neutral explanation for exercising a peremptory challenge need not be persuasive or even plausible; it will be deemed race-neutral unless a discriminatory intent is inherent in the explanation.

3. Jury ⇐33(5.15)

The ultimate burden of persuasion as to racial motivation in exercising a peremptory challenge rests with, and never shifts from, the opponent of the peremptory challenge.

4. Criminal Law ⇐1158(3)

The trial court's findings with regard to a *Batson* challenge are entitled to great deference on appeal.

5. Jury ⇐33(5.15)

When a defendant voices a *Batson* objection to the State's exercise of a peremptory challenge, the finding of the absence of discriminatory intent depends upon whether the trial court finds the prosecutor's race-neutral explanations to be credible; credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.

6. Criminal Law ⇐1158(3)

In the context of a direct review of a *Batson* issue, the trial court's decision on the ultimate question of discriminatory intent by the State is a finding of fact accorded great deference, which finding will not be overturned unless clearly erroneous; deference is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations.

7. Jury ⇐33(5.15)

Focus of the *Batson* framework is to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process.

8. Jury ⇐33(5.15)

Capital defendant failed to carry his ultimate burden of persuasion that the State exercised peremptory challenges against two African–American prospective jurors in a purposefully discriminatory manner; prosecutor's reasons for striking first juror were that he appeared "very nervous" throughout questioning and that he would be missing class, as a student teacher, if chosen to serve on the jury, prosecutor struck second juror because "she was very weak on her ability to consider the imposition of the death penalty," prosecutor's demeanor was evaluated by the trial court which found no discriminatory intent, and these explanations were reasonable and the proffered rationale had some basis in accepted trial strategy.

Capital Appeals Project, Jelpi P. Picou, Jr., Marcia A. Widder, Aneel L. Chablani, for applicant.

Charles C. Foti, Jr., Attorney General, Paul D. Connick, Jr., District Attorney, Terry M. Boudreaux, James A. Williams, Alfred A. Olinde, Jr., Assistant District Attorneys, for appellee.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

WEIMER, Justice.*

[1]Defendant was convicted of first degree murder and sentenced to death. On direct appeal, this court ultimately affirmed defendant's conviction and sentence. Currently, the case is on remand from the United States Supreme Court, which directed that we again review defendant's *Batson* claims, this time in light of *Miller–El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). After reviewing defendant's *Batson* complaints cumulatively in light of the entire record as directed by *Miller–El*, we find the trial court did not err in determining the veni-repersons were not excused by the State in a racially discriminatory manner. Therefore, for the reasons that follow, the judgment affirming defendant's conviction and sentence is reinstated.

[2]FACTS AND PROCEDURAL HISTORY

Defendant was indicted in Jefferson Parish for the first-degree murder of Howard Wilson.[1] On June 28, 1996, defense counsel was notified in writing that the State was seeking the death penalty. A trial was subsequently held. During voir dire, defendant charged that the State exercised several of its peremptory challenges against African–American prospective jurors in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The trial court denied defendant's *Batson* challenges. Consequently, defendant, who is African–American, was tried by an all-white jury. On August 29, 1996, the jury found defendant guilty as charged. After finding the presence of one aggravating circumstance,[2] the same jury unanimously determined defendant should receive the death penalty. The trial court subsequently imposed a sentence of death.

Defendant appealed his conviction and sentence directly to this court pursuant to La. Const. art. V, § 5(D), which provides that a case shall be appealable to the supreme court if the defendant has been convicted of a capital offense and a penalty of death actually has been imposed. This court reviewed defendant's *Batson* claims and concluded the trial court did not abuse its discretion or err in its denial of the claims. *State v. Snyder*, 98–1078, p. 11 (La.4/14/99), 750 So.2d 832, 842 (Snyder I). Thus, we conditionally affirmed defendant's conviction and sentence, but remanded the case to the trial court for a retrospective determination of defendant's [3]competency at the time of trial, if one could be made. *Id.*, 98–1078 at 43, 750 So.2d at 863.

Following our remand, the trial court held a bipartite hearing to determine whether a *nunc pro tunc* ruling could be made with respect to defendant's competency at the time of trial and whether defendant was competent to proceed with trial. The trial court ruled that a retrospective determination of defendant's competence was possible and that defendant was competent at the time of trial. Defendant appealed these rulings to this court.

* Retired Judge Fred C. Sexton, assigned as Associate Justice *Ad Hoc.*, sitting for Associate Justice Jeannette T. Knoll, recused.

1. The specific facts of the crime for which defendant was convicted are discussed in *State v. Snyder*, 98–1078 (La.4/14/99), 750 So.2d 832 (Snyder I).

2. The jury specifically found that defendant "knowingly created a risk of death or great bodily harm to more than one person." *Snyder*, 98–1078 at 3 n. 2, 750 So.2d at 837 n. 2. Snyder's estranged wife, Mary, was in a vehicle with Howard Wilson when defendant attacked both. Wilson died at the hospital, but Mary survived the attack and testified at trial. *Id.*, 98–1078 at 3, 750 So.2d at 836.

Upon finding the trial court complied with procedural due process requirements and the testimony and evidence supported the trial court's determination of competency, this court unconditionally affirmed the judgment of the trial court and sentence of death. *State v. Snyder*, 98–1078, p. 11 (La.4/14/04), 874 So.2d 739, 745 (*Snyder II*).

Subsequently, the Supreme Court of the United States granted defendant's petition for a writ of certiorari, vacated the judgment of this court, and remanded the case for further consideration in light of *Miller-El*, 545 U.S. 231, 125 S.Ct. 2317.[3] *Snyder v. Louisiana*, — U.S. —, 125 S.Ct. 2956, 162 L.Ed.2d 884 (2005).

LEGAL PRECEPTS

[1] The Equal Protection Clause of the United States Constitution prohibits engaging in purposeful discrimination on the grounds of race in the exercise of peremptory challenges. *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719. The *Miller-El* decision that forms the basis for this remand was the third in a trilogy of Supreme Court opinions related to the allegedly discriminatory exercise of peremptory challenges in criminal trials. The trilogy presents a pendulous treatment by the Court of the issue of the evidentiary burden placed on a criminal defendant who claims that equal protection has been denied through the State's use of peremptory challenges to exclude individuals from the petit jury on the basis of race.

In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the Supreme Court recognized that a State's purposeful or deliberate denial of participation as jurors on account of race violates the Equal Protection Clause. Reviewing the "very old credentials" of the peremptory challenge system, the Court noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Id.*, 380 U.S. at 219, 85 S.Ct. at 835. The majority of the Court sought to accommodate both the prosecutor's historical privilege of peremptory challenge free of judicial control and the constitutional prohibition on exclusion of persons from jury service on account of race. Because the State may not exercise its challenges in contravention of the Equal Protection Clause, the Court held it was impermissible for a prosecutor to use challenges to exclude African–Americans from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to them "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.*, 380 U.S. at 224, 85 S.Ct. at 838. Thus, proof by a defendant that members of his race were struck from his jury was insufficient; a defendant's burden was to show the circumstances under which prosecutors were responsible for striking minority jurors beyond the facts of a particular case. *Id.* 380 U.S. at 223–228, 85 S.Ct. at 838–840. Proof of repeated striking of African–Americans over a number of cases

3. This was the second *Miller-El* opinion rendered by the Supreme Court. In the first, *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), the Court did not address the merits of petitioner's claim to federal habeas relief from a state court conviction for capital murder. The procedural posture of the case at that time was that the federal District Court had denied the petition and the federal Court of Appeals had denied a certificate of appealability (COA). The Supreme Court granted certiorari and reversed, finding that a COA should have issued. The Court found the District Court did not give full consideration to the substantial evidence petitioner put forth in support of a prima facie case; instead, it accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial.

was necessary to establish a violation of the Equal Protection Clause.

Twenty-one years after *Swain*, the Court swung the pendulum in the opposite direction, finding that the evidentiary formulation of *Swain* was inconsistent with standards that had developed during those years for assessing a prima facie case under the Equal Protection Clause. In *Batson*, 476 U.S. at 92–93, 106 S.Ct. at 1721, the Court called the *Swain* requirement "a crippling burden of proof" that had made prosecutors' peremptory challenges "largely immune from constitutional scrutiny." The Court held that a defendant could establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Evidence of a pre-existing pattern of discrimination in previous cases was no longer required.

Another 19 years later, in *Miller-El*, the Supreme Court moved the pendulum back toward middle ground. Stating that although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*'s "wide net," the Court noted the net should not have been consigned to history; *Batson*'s individualized focus had an inherent weakness of its own caused by its very emphasis on the particular reasons a prosecutor might give. "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*." *Miller-El*, 545 U.S. at 240, 125 S.Ct. at 2325. Thus, the Court reiterated—this time in a habeas proceeding[4]—*Batson*'s explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination. *Id.*[5]

Nevertheless, the Court left the *Batson* test intact in *Miller-El* and reaffirmed that position in *Rice v. Collins*, 546 U.S. 333, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006). Louisiana law codifies the *Batson* ruling in LSA-C.Cr.P. art. 795(C), which provides:

> No peremptory challenge made by the state or the defendant shall be based solely upon the race of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race, and a prima facie case supporting that objection is made by the

4. The defendant's habeas petition sought review pursuant to 28 U.S.C.A. § 2254, which was explained by the Court as follows:

> Where 28 U.S.C. § 2254 applies, [the Court's] habeas jurisprudence embodies [significant] deference. Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2).

Miller-El, 537 U.S. at 340, 123 S.Ct. at 1041.

5. The concern expressed by the majority of the Supreme Court in *Swain*, 380 U.S. at 219, 85 S.Ct. at 825, for accommodating the prosecutor's historical privilege of peremptory challenge was eroding as early as *Batson*, 476 U.S. at 102–103, 106 S.Ct. at 1726, when Justice Marshall, concurring with the majority stated: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." Currently, in *Miller-El*, 545 U.S. at 269–74, 125 S.Ct. at 2342–2344, Justice Breyer, in a concurrence, noted that peremptory challenges are increasingly anomalous in our judicial system. He wrote, "If used to express stereotypical judgments about race, gender, religion or national origin, peremptory challenges betray the jury's democratic origins and undermine its representative function." Justice Breyer concluded that Miller-El illustrated the necessity of reconsideration of the Batson test and the peremptory challenge system as a whole. *Id.*

objecting party, the court may demand a satisfactory racially neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.

[2–6] The race-neutral explanation need not be persuasive or even plausible. *Collins*, — U.S. at —, 126 S.Ct. at 973–974, *quoting Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). It will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. The ultimate burden of persuasion as to racial motivation rests with, and never shifts from, the opponent of the peremptory challenge. *State v. Tyler*, 97–0338, p. 3 (La.9/9/98), 723 So.2d 939, 942, *cert. denied*, 526 U.S. 1073, 119 S.Ct. 1472, 143 L.Ed.2d 556 (1999). The trial court's findings with regard to a *Batson* challenge are entitled to great deference on appeal. *Id.* at 4;[6] *see also, State v. Juniors*, 03–2425, p. 28 (La.6/29/05), 915 So.2d 291, 316. When a defendant voices a *Batson* objection to the State's exercise of a peremptory challenge, the finding of the absence of discriminatory intent depends upon whether the trial court finds the prosecutor's race-neutral explanations to be credible. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El v. Cockrell*, 537 U.S. 322, 339, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003).

The three-step *Batson* process which guides the courts' examination of peremptory challenges for constitutional infirmities has recently been described again by the Supreme Court as follows:

> A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Internal quotations and citations omitted.]

Collins, — U.S. at —, 126 S.Ct. at 973–74.

The Court's decision in *Miller-El*, 545 U.S. 231, 125 S.Ct. 2317, a multifaceted and fact-bound opinion on the merits of defendant's claim to habeas relief, further

6. We note the standard of review in a federal habeas case is different from that on direct appeal. In the context of a direct review of a *Batson* issue, the trial court's decision on the ultimate question of discriminatory intent by the State is a finding of fact accorded great deference, which finding will not be overturned unless clearly erroneous. *Miller-El*, 537 U.S. at 340, 123 S.Ct. at 1041. "Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations." *Id.*, 537 U.S. at 339, 123 S.Ct. at 1041.

clarifies the analysis to be used in *Batson*'s third and final step.[7] Although the case is a federal habeas case, it nevertheless indicates the type of evidence to be considered and the appropriate scope of an evaluation of the prosecutor's reasons to be applied by the trial court at the time a *Batson* challenge is raised, which are later pertinent to direct review by the appellate courts.

The *Miller-El* opinion begins by recognizing *Batson*'s weakness is its "very emphasis on the particular reasons a prosecutor might give." *Miller-El*, 545 U.S. at 240, 125 S.Ct. at 2325. The Court continued, "Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand." *Id.* *Miller-El*, therefore, redirects attention to "*Batson*'s explanation that a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination," *Id.*, and to the trial judge's duty under *Batson* "to assess the plausibility" of the prosecutor's proffered reason for striking a potential juror "in light of all *evidence* with a bearing on it." (Emphasis supplied.) *Id.*, 545 U.S. at 252, 125 S.Ct. at 2331.[8]

In stating that the trial court must evaluate the prosecutor's proffered reasons to determine whether they are pretextual for a discriminatory intent, the Court made it abundantly clear that while a prosecutor might have some difficulty explaining his strikes that are oftentimes based on instinct, he simply must attempt to put his feelings into words. A trial court cannot overrule the *Batson* challenge merely because the court itself can envisage a race-neutral reason that could explain the use of a peremptory challenge against that individual. In this regard, the Court plainly stated that when "illegitimate grounds" such as race are in issue, a prosecutor simply must state his reasons "as best he can and stand or fall on the plausibility of the reasons he gives." *Id.*, 545 U.S. at 252, 125 S.Ct. at 2332.[9]

7. The Court had previously noted that the defendant had been indicted for capital murder in Texas. *Miller-El*, 537 U.S. at 328, 123 S.Ct. at 1035. He pled not guilty and jury selection took place during five weeks in February and March of 1986. When *voir dire* concluded, defendant moved to strike the jury on grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African-Americans through the use of peremptory challenges. Defendant's trial occurred prior to the Court's decision in *Batson*, while *Swain* was controlling precedent. As that case required, defendant sought to show that the prosecution's conduct was part of a larger pattern of discrimination aimed at excluding African-Americans from jury service. In a pretrial hearing, defendant presented extensive evidence in support of his motion. *Id.*

The Texas district court denied the motion to strike the jury, and 12 days later the jury found defendant guilty. The trial court sentenced him to death. *Id.*

Defendant appealed to the Texas Court of Criminal Appeals. While that appeal was pending, on April 30, 1986, the Supreme Court decided *Batson*. The Texas Court of Criminal Appeals remanded the case for new findings in light of *Batson*, and a post-trial hearing was held in 1988, two years after the allegedly discriminatory *voir dire*. *Id.*, 537 U.S. at 328-329, 123 S.Ct. at 1035.

8. One of the arguments defendant's appellate counsel makes would take us outside the four corners of the appellate record for so-called proof "that race discrimination is routine in Jefferson Parish." We decline to address this "historic discrimination" issue as the details of counsel's argument are not evidence. We do not view *Miller-El*, a habeas proceeding in federal court, as license to consider matters that are dehors the record which is before us on direct appeal.

9. This requirement is arguably at odds with the Louisiana statutory provision that provides "the court *may* demand a satisfactory

After a detailed discussion of all the evidence presented in support of defendant's *Batson* challenge, the Court concluded that the totality of the evidence showed the trial court was unreasonable and erroneous in determining the prosecutor's strikes of two potential jurors were not racially motivated. The Court summarized the myriad pieces of evidence that together yielded its decision. The [10] Court found the existence of several disturbing factors that together indicated the prosecution's proffered race-neutral reasons were mere pretext for discriminatory intent: (1) the "bare statistics," which showed that out of 20 black members of the 108-person venire panel, only 1 served, *Id.*, 545 U.S. at 240, 125 S.Ct. at 2325; (2) a "comparative juror analysis," or a side-by-side comparison, of some African-American panelists who were struck and white panelists who were allowed to serve, *Id.*, 545 U.S. at 239–53, 125 S.Ct. at 2325–32; (3) the "broader patterns of practice" that occurred during jury selection, which included inexplicable jury shuffling [9] and disparate questioning of African-American and non-African-American panelists, *Id.*, 545 U.S. at 252–62, 125 S.Ct. at 2332–38; and (4) historical evidence that the particular District Attorney's office involved in the case had for decades followed a known, formal, and specific policy of systematically excluding African-Americans from juries, *Id.*, 545 U.S. at 262–66, 125 S.Ct. at 2338–39. The Court readily acknowledged that the significance of some of the evidence of discriminatory intent was "open to judgment calls," but reasoned that when the evidence was viewed cumulatively, it was "too powerful to conclude anything but discrimination." *Id.*, 545 U.S. at 265, 125 S.Ct. at 2339.

The *Miller-El* opinion does not dwell on the trial court's credibility determination in favor of the prosecution. However, the Court's next *Batson*-third-step case, *Collins*, illustrates the difficulties courts face in attempting to review a trial court's resolution of a *Batson* challenge. In that case, a *Batson* challenge was made [11] after the prosecution struck a young, African-American female panelist, and the challenge was rejected by the state courts and the federal district court. However, when defendant sought collateral habeas corpus relief in the federal courts, the Ninth Circuit Court of Appeals reversed on grounds that the trial court had acted unreasonably by crediting the prosecutor's race-neutral reasons for striking the juror. *Collins v. Rice*, 348 F.3d 1082 (9 Cir.2003), *amended and superseded by*, 365 F.3d 667 (9 Cir. 2004).

racially neutral reason for the exercise of the challenge, *unless the court is satisfied that such reason is apparent from the voir dire examination of the juror.*" (Emphasis supplied.) LSA-C.Cr.P. art. 795(C). In the instant case, the prosecutor volunteered race neutral reasons each time defense counsel made a *Batson* objection. Thus, it is unnecessary for us to address reconciliation of the Louisiana provision with the mandate of *Miller-El*. We do observe, however, that the Louisiana statute's grant to the trial court of broad discretion in ruling on a *Batson* objection in light of apparent reasons from the voir dire may have been interpreted by the trial court as alleviating any necessity for explanation by the court of its reasons for allowing the State's peremptory challenges.

10. Jury shuffling was explained in *Miller-El*. Texas law permits either side in a criminal case to shuffle the cards bearing panel member names to rearrange the order in which they are questioned. Members seated in the back may escape *voir dire*, for those not questioned by the end of each week are dismissed. The Court noted the prosecution had shuffled the cards when a predominate number of African-Americans were seated at the front of the panel. *Miller-El*, 545 U.S. at 252–55, 125 S.Ct. at 2332–2333.

The Supreme Court reversed, finding the Court of Appeals had "improperly substituted its evaluation of the record for that of the state trial court." *Collins*, —— U.S. at ——, 126 S.Ct. at 973. The Court found the record did not demonstrate that a reasonable factfinder must necessarily conclude the prosecutor lied about his reasons for striking the panelist. *Id.* at 975.

Thus, the most recent admonition by the Supreme Court on jury selection after *Batson* focuses, not on a reviewing court's stringent parsing of a prosecutor's race-neutral reasons to ferret out pretext masking discriminatory intent, but on the leeway a reviewing court must grant a trial court in its evaluation of the credibility of the prosecutor in the third step of the *Batson* analysis. One clear difference between *Collins* and *Miller-El* is that there was no evidence that issues of race pervaded the entire voir dire in *Collins*. Furthermore, there was nothing beyond the four corners of the *Collins* voir dire to cause the Court to question the sincerity of the prosecutor's challenges.

[7] Notwithstanding the differences and similarities of *Miller-El* and *Collins*, the focus of the *Batson* framework is "to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson v. California*, 545 U.S. 162, 172, 125 S.Ct. 2410, 2418, 162 L.Ed.2d 129 (2005) (Permissible inferences of discrimination were sufficient to establish a prima facie case of discrimination, which satisfied the first *Batson* step.) While *Miller-El* indicates the type and quantum of evidence to be considered at *Batson*'s third step, *Miller-El*, *Collins*, and *Johnson* add no new elements to the venerable *Batson* analysis. *See Murphy v. Dretke*, 416 F.3d 427, 439 (5 Cir.2005) ("The Court did not announce any new elements or criteria for determining a *Batson* claim, but rather simply made a final factual and evidentiary determination of that particular petitioner's *Batson* claim."); Amanda S. Hitchcock, *"Deference Does Not By Definition Preclude Relief": The Impact of Miller-El v. Dretke on Batson Review in North Carolina Capital Appeals*, 84 N.C. L.Rev. 1328, 1330 (2006). Consequently, while *Miller-El* requires a somewhat expanded review of defendant's *Batson* claims, we perform our review pursuant to the typical *Batson* framework and the Louisiana constitutional and statutory provisions.

APPLICATION OF PRINCIPLES

Miller-El and *Collins* necessarily shape this court's response to the Supreme Court's present remand order and our reconsideration of the *Batson* issue, but do not require a detailed reconsideration of the voir dire of the five African-American prospective jurors peremptorily struck by the State. As we stated in *Snyder I*, the State's use of five of its peremptory challenges to strike African-American prospective jurors who survived challenges for cause resulted in defendant's being tried by an all-white jury.[11] Now defendant reargues that the State's use of "close to half" of its peremptory strikes to "exclude an entire group comprising only fourteen percent of the qualified pool" is

11. As noted in defendant's brief on remand, the only African-American venire person not stricken by the State, Jacqueline Woods, was in the seventh panel, which was questioned to seat two alternate jurors after the twelve-member jury had already been selected. None of the alternates sat. We agree with defendant's appellate counsel that the selection of Woods does not defeat defendant's *Batson* claim. *See State v. Harris*, 01-0408 (La.6/21/02), 820 So.2d 471 (*Batson* error required new trial, despite presence of one African-American on the jury.)

compelling evidence that the State's strikes were made on the impermissible basis of race.

Considering this argument, this court's current task is eased by an initial winnowing out of some of the challenged jurors. Currently, defense counsel makes no argument with regard to Loretta Walker, almost certainly because the record offers ample affirmative support for the prosecutor's challenge.[12]

With respect to two other prospective jurors, Greg Scott and Thomas Hawkins, Jr., this court previously found that the defendant waived any *Batson* claim on appeal by failing to object when the prosecutor struck the jurors, although defense counsel noted their race for the record. More importantly, defense counsel did not ask the prosecutor to articulate his race-neutral reasons for excusing Greg Scott and Hawkins when the *Batson* challenge was posed after the State struck Elaine Scott from the third panel of prospective jurors. *Snyder*, 98-1078 at 7-8, 750 So.2d at 839-40.[13] There is nothing in *Miller-El* or *Collins* that casts doubt on the correctness of this portion of Snyder I.

[8] Despite defense counsel's reiteration of the argument concerning the remaining two potential jurors, we turn to our previous decision regarding these persons:

> Defense counsel did ... lodge the proper *Batson* objections to the State's use of peremptory challenges against potential jurors Jeffrey Brooks [and] Elaine Scott.... The State originally accepted Brooks as a juror, but later backstruck him. The prosecutor's reasons for striking Brooks were that he appeared "very nervous" throughout questioning and that he would be missing class, as a student teacher, if chosen to serve on the jury. The prosecutor stated, "He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase."[14] Defense counsel responded by stating:

12. Walker stated initially that she could not consider the death penalty under any circumstances. Upon further questioning, Walker conceded that she could consider capital punishment in the case of the murder of a child. As the prosecutor informed the trial court, this case did not involve the killing of a child, and he therefore excluded Walker peremptorily on the basis of her general opposition to the death penalty.

13. Because the State had accepted Jeffrey Brooks in the first panel of prospective jurors, the strikes exercised against Greg Scott in the second panel and Hawkins in the third panel did not reveal any pattern of exclusions which might have supported an objection on *Batson* grounds. However, the care with which defense counsel noted the race of the jurors for the record placed both the State and the trial judge on notice that a *Batson* challenge might be forthcoming. Defense counsel then made the challenge during the examination of the third panel of prospective jurors and at that point could have argued that the State should also have to defend its strikes against Scott and Hawkins because they formed part of a pattern that became apparent with the later strike of Elaine Scott. However, counsel did not argue for the inclusion of Greg Scott and Hawkins in his *Batson* challenge, thereby prompting this court's procedural default on appeal of this aspect of the State's jury selection.

This court further found that counsel's failure to expand the basis of the *Batson* objection did not constitute ineffective assistance because the State's exclusion of Scott and Hawkins did not directly and fundamentally impact the integrity of the fact-finding process at trial. *Snyder*, 98-1078 at 11-12, 750 So.2d at 842, *citing Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

14. Before the court allowed the State's exercise of a peremptory challenge of Brooks, the State explained further: "If this case goes to the jury on Friday and one of them gets back

His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school and whoever it was and the Dean said that wouldn't be a problem. He was told that this would go through the weekend, and he expressed that that was his only concern, that he didn't have any other problems.

As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous.

The court allowed the State to exercise a peremptory challenge on Brooks.

With respect to prospective juror Elaine Scott, the district attorney excused her, stating, "I observed she was very weak on her ability to consider the imposition of the death penalty. Her words, exactly—I wrote it down, that she thinks she could, and that's the reason for our challenge." However, when asked again by the prosecution if she could impose the death penalty, she responded, "I could." She also responded affirmatively when asked if she could listen to the evidence and consider whether to accept or reject the insanity defense and hold the defense to its burden of proof. Nevertheless, the trial court accepted the State's explanation as race neutral and excused Elaine Scott.

[illegible]....

The trial court entertained the State's race neutral reasons for the exclusions without making a finding as to whether defendant had made a prima facie showing of purposeful racial discrimination. A trial court's "demand that a prosecutor justify his use of peremptory strikes is tantamount to a finding that the defense has produced enough evidence to support an inference of discriminatory purpose." *State v. Green*, 94-0887, p. 25 (La.5/22/95), 655 So.2d 272, 288. Nevertheless, the issue of whether the defense established a prima facie case of discrimination is moot once the prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination. *Id.* (applying *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)). Nonetheless, any response will qualify as race neutral "unless a discriminatory intent is inherent in the prosecutor's explanation." *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

Here, the trial court did not find that defendant had established purposeful discrimination and overruled the *Batson* objections. These rulings appear correct. Although not required by the caselaw, the State's proffered reasons were plausible, supported by the record and race-neutral. [Citations omitted.] The prosecutor's reasons constituted "legitimate" grounds for the exercise of a peremptory strike. [Citation omitted.] None of the reasons articulated by the State are readily associated with the suspect class that is alleged to be the object of the State's discriminatory use of peremptory challenges. Defendant, the opponent of the strikes, offered no facts or circumstances supporting an inference that the State exercised its strikes in a racially discriminatory manner. Therefore, the defendant's proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of dis-

there and gets' smart and thinks that if they come back [with] guilty of second degree murder, they won't have to do a penalty phase. I guarantee that's a very real concern."

criminatory intent. *See State v. Green*, 94-0887 at p. 27, 655 So.2d at 289.

After carefully reviewing the entire record of voir dire, we find no abuse of discretion or error by the trial court in its denial of defendant's *Batson* claims. The trial court heard the prospective jurors and concluded there were reasonable bases for the challenges in question. The record does not show that the State employed a tactic of purposeful discrimination in its exercise of peremptory challenges. [Record references and footnote omitted.]

Snyder, 98-1078 at 9-11, 750 So.2d at 840-842.

[16]Contrary to defense counsel's argument on remand,[15] we do not read the Supreme Court's remand as a "rejection of the analysis performed" in *Snyder I* with regard to defendant's "claim that the prosecutor in his case was illegally removing African-American venire persons based on their race in violation of *Batson*." Although the Supreme Court vacated the judgment and ordered reconsideration in light of *Miller-El*, we view the remand as a mere expansion of our review, not a rejection of the analysis made solely on a careful review of "the entire record of the voir dire." *Snyder*, 98-1078 at 11, 750 So.2d at 842.

Nevertheless, we have conducted another review of the voir dire transcript and find nothing there to disparage the above quoted *Batson* analysis conducted by this court in *Snyder I*. Indeed, our review uncovered a factor favorable to the State's use of a peremptory challenge to backstrike Brooks that was not mentioned in *Snyder I*.

At the beginning of the voir dire, the trial court gave a brief explanation of the jury selection process. The court announced the eligibility requirements for jury service and then asked the members of the venire who had any basis for disqualification or a significant reason that would warrant excusal to approach the bench. Each venire member approached the bench individually and provided his or her reason for ineligibility or for excusal. Some persons were questioned further by the State or the defense as to their reasons, and then the court either excused them or denied their requests.

During this preliminary voir dire process, the State consistently inquired of a potential juror whether or not his or her particular problem would prevent [17]concentration on the evidence so as to impair the juror's decision-making task. For example, when speaking to potential juror Chauffe, a single-mother of a school-aged child who claimed transportation problems, the prosecutor asked: "If you got selected on this jury anyway, despite what you're telling us, do you think that you would be able to pay attention to the evidence in the case, and listen to the Judge, and be a good juror? Or do you feel you would be worrying too much and not be able to listen to the evidence?" When Chauffe answered the second question affirmatively, the court excused her. The prosecutor asked the same type of question of prospective jurors Pickett, Nguyen, Laws, Perkins, and Miller.

Later, when the State exercised a peremptory challenge to backstrike Brooks, the race-neutral reason given was the prosecutor's reservations about this student teacher's ability to consider the issues

15. Defendant's current counsel was not involved in his representation at any stage of the trial or direct appeal. The Capital Appeals Project undertook representation following the denial of rehearing by this court on June 25, 2004, and prepared and filed the Petition for Writ of *Certiorari* to the Supreme Court of the United States.

without being distracted by his concerns about school. This reason was consistent with the concern voiced in the questioning of other potential jurors during the pre-voir dire process mentioned above.

Further, acknowledging that the peremptory challenge of Brooks requires a more detailed discussion than the challenge of Scott, we note defense counsel's comparison of the State's challenge of Brooks with the State's acceptance of Yeager and Sandras,[16] both white males on the fifth panel.[17] Yeager expressed concern with jury service because he had a commitment to an event scheduled for Sunday that he had been an integral part of for many years. Sandras reported he taught at the University of New Orleans, had just begun the semester, and would have a problem with any "prolonged absence." We note that both of these men were employed and apparently already had established careers; Brooks, on the other hand, was attempting to complete his college courses in order to begin a career in teaching.

The fact that Brooks actually approached the bench on his own volition and raised his teaching obligations as a hardship excuse indicates he was truly concerned, more so than Sandras and Yeager. When Brooks approached the bench to raise a hardship concern at the beginning of the jury selection proceeding, Brooks stated to the court that "there is something I'm missing right now that will better me towards my teaching career." On the other hand, Sandras and Yeager merely responded to defense counsel questioning posed to their panel regarding any jurors' personal reasons or pre-existing obligations which would make it difficult to concentrate or serve on the jury. Thus, Brooks initiated the concern about the trial being a hardship, while Sandras and Yeager merely responded to questions.

Defense counsel also would have us dismiss the State's claim that Brooks appeared nervous because certain questions Brooks asked during voir dire did not indicate nervousness. However, the fact that Brooks was articulate during the voir dire may have contributed to the prosecutor's fear that he would get "smart" during jury deliberation and suggest a verdict lesser than the death penalty. *See* Footnote 14, *supra*. Additionally, nervousness cannot be shown from a cold transcript, which is why only the trial judge can evaluate the demeanor of the juror and why the judge's evaluation must be given much deference. In *Collins*, the Supreme Court found that the Ninth Circuit had been too aggressive in its review and in its ultimate ruling which reversed the trial court's *Batson* rulings. The Supreme Court concluded the Ninth Circuit had improperly substituted its evaluation of the record for that of the state trial court. *Collins*, — U.S. —, 126 S.Ct. at 973, 163 L.Ed.2d 824.

16. Defense counsel also argues the State's challenge of Brooks was inconsistent with the prosecutor's failure to question McMurray about her concerns over a court-reporting course at Franklin College that she was just starting. Although McMurray approached the bench during the pre-voir dire process, her chief articulated concern was someone to take care of her two-and-a-half year old daughter. The court did not excuse her prior to the questioning of the second half of the second panel of jurors. During the prosecutor's questioning of the panel about the insanity defense, McMurray's responses indicated such a strong reservation concerning that defense that the responses obviated the need for questioning her about her ability to concentrate despite her personal problems. Subsequently, there was a predictable defense challenge for cause of this prospective juror that was granted by the court.

17. By the time the fifth panel was called, the State had already backstruck Brooks.

There was no indication that race was the underlying reason for backstriking Brooks any more than race was a consideration in the prosecutor's questions to the other potential jurors. *See State v. Harris*, 01-0408, p. 8 (La.6/21/02), 820 So.2d 471, 476 (The comparison of the treatment of the potential jurors of different races has been utilized by this court in a measurement of the racially-neutral reason for the exercise of the prosecution's challenge.)

The final part of our analysis is based on a review of the record as a whole as instructed by the Supreme Court in *Miller-El*, 545 U.S. at 240, 125 S.Ct. at 2325, 2331 ("[A]ll relevant circumstances" and "all evidence with a bearing" on the *Batson* issue must be considered.) First, we consider the proceeding at which the issue of racial prejudice was raised prior to the beginning of voir dire.

At a July 29, 1996 hearing to determine whether the State would be permitted to introduce at trial evidence of five incidents of domestic violence allegedly committed by defendant against his estranged wife to show defendant's motive and intent, the State made reference to "another case that was on television everyday for the last couple of years ... where this very thing happened." [18] Thereafter, on August 16, 1996, defense counsel filed a motion *in limine* specifically requesting the State be precluded at trial from referring to or making comparisons with O.J. Simpson or his trial, as such references would serve no purpose other than to confuse and prejudice the jury. The prosecutor responded:

> I think [the defense motion is] premature.... I can assure the Court that I'm not going to get up in my opening voir dire and say [that] "we're here for the Jefferson Parish O.J. Simpson ... case." I have no intentions of doing that. I have no—perhaps in argument, I don't know.
>
> ....
>
> I have given the Court my word that I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case.... I just ask [the court] not to grant this motion.

After the hearing,[19] the trial court denied defendant's motion based on the prosecutor's representations.

18. This proceeding was a *Prieur* hearing at which defense counsel attempted to have the evidence excluded as being irrelevant. At the hearing, the State identified the five incidents that had been included in the *Prieur* notice: 1) In May of 1995, Snyder beat his wife with a baseball bat. 2) On March 11, at a club in Kenner, Snyder hit his wife's head into the window of his truck. 3) On June 11, 1995, Snyder pushed his wife's head through the sheetrock wall of their bedroom. 4) On June 18, 1995, at the home of the parents of Mary Snyder, Snyder accosted his wife as she slept, put his hand over her mouth, and stabbed her several times with a screwdriver. 5) On another occasion, in a telephone call, Snyder threatened his wife with more bodily harm. In context, the State's reference to the O.J. Simpson case was an illustration to the court of the relevance of such incidents. The trial court ruled evidence of all five of the incidents would be admissible at defendant's trial.

19. In its motion, defense counsel stated:

> Surveys conducted since the verdicts in the O.J. Simpson trial have shown consistently that a large majority of white Americans believe the not guilty verdicts were wrong; many indicate that the verdicts have undermined their faith in the entire jury system. To play upon these fears and prejudices to what will doubtless be an overwhelmingly—if not all—white jury deciding the case with admitted similarities is an appeal to racism at worst and vigilante justice at best, and as such is specifically precluded by Louisiana law.

Despite the allegations of the defense motion, neither side introduced evidence at the hearing on the motion. Thus, the trial court's

Voir dire began against this backdrop on August 27, 1996.

Next, we note that the State did, in fact, make an indirect reference to the O.J. Simpson case during its rebuttal argument at the penalty phase of the trial. Because the reference was made during rebuttal, the reference was preceded by the following argument of defense counsel:

> [S]ome of the mitigating circumstances that we believe we've been able to demonstrate to you ... [relate to] whether Mr. Snyder was under extreme emotional or mental influence at the time of this particular incident.... I really didn't have to do much to show facts that might suggest that, because the State, when they put on their case, ... the officer from Kenner ... said that when he found Allen Snyder a couple of hours or 12 hours or so after this incident, he was curled up in a fetal position. He was suicidal. He kept saying, "They're coming to get me. [2] They're coming to get me." ... [T]here's never been any indication that Mr. Snyder was somehow staging that particular incident in order to get himself a better situation or a better sentence or to help himself out in any way.
>
> The testimony of that officer was accurate and it was truthful. The other thing that he testified to was that that house was in shambles. The furniture was strewn all about. Furniture was put up ... doors were barricaded. The furniture was being used as a barricade.... I'll ask you if that is not suggestive of some sort of [mental] disturbance.

The portion of the State's rebuttal argument that the defendant now complains about was in direct response to the above quoted argument. Specifically, the prosecutor stated:

> It's been very clear, and this is the last thing I'm going to say about Allen Snyder, that the kind of person he is, as Mr. Olinde described him in his opening statement, he's egocentric, and he has shown no remorse. More than that, as he stabbed his wife 15 times, put her through what Dr. Harkness described as a near-death experience, as she lay there gushing blood, as Mary Snyder sat in that seat right there, he left her there. He left her there to die. And when Detective Labat took the statement from him 12 hours later, ... not a word at any time where you would have heard him, how's my wife? Is she okay? Not a word. Is that because he's depressed or because he's got a far deeper problem?
>
> Brief mention. Mr. Vasquez tried to describe this man as being the man who—And it was 12 hours later when he called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of—[At this point in the rebuttal argument, defense counsel voiced an objection, and both counsel approached the bench. The prosecutor argued the reference to the O.J. Simpson case was fair based on the similarities between what Synder did and what Simpson did, specifically pretending to be suicidal. The trial court overruled the defense objection.]
>
> The most famous murder case ... happened in California very, very, very similar to this case. The perpetrator in that case claimed that he was going to

denial was based solely on the argument of counsel.

> kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that's not what that man was thinking about when he called in and claimed that he was going to kill himself?

In brief to this court, defense counsel urges this court to consider that the prosecutors selected an all-white jury as a means of playing their "O.J. card, an argument that persuaded two members of the court, Justices Johnson and Lemmon, to dissent from the majority decision." *See Snyder*, 98–1078 at 3, 750 So.2d at 864 (Lemmon, J., concurring in part and dissenting in part) ("I find compelling the rhetorical question by defense counsel in oral argument before this court, asking whether the prosecutor would have ranted about O.J.'s getting away with it if he had not backstruck the only black juror toward the end of voir dire.")

However, other than suggesting inferences to be drawn from the bare facts of the prosecutor's remarks both prior to and subsequent to the voir dire, defense counsel points to no evidence in the record to substantiate defendant's claim of discriminatory use of the peremptory challenges. The inferences defense counsel suggests are no more compelling than other race neutral inferences to be drawn when one considers the prosecutor's remarks in context. The remark at the motion in limine referred to the fact that the Simpson trial involved alleged domestic violence; the remark during rebuttal referred to the fact that Simpson feigned suicidal intent. Neither remark referred to Simpson's or Snyder's race. Counsel's citations to authorities concerning the Simpson trial never were, and are not now, part of the record before this court for review.

Miller-El directs that we cumulate all relevant items tending to point to racial discrimination and view them together when considering whether the trial court's determination of the existence of discrimination is clearly erroneous. Nevertheless, *Miller-El* directs that this court examine the precise reasons given by the State for its strike of Scott and Brooks. This court cannot attempt to hypothesize another reason that the State may have had for its strikes. As stated by the Court, the State must "stand or fall on the plausibility of the reasons he gives." *Miller-El*, 545 U.S. at 252, 125 S.Ct. at 2332. Consequently, we find that when the entirety of the record of defendant's case is reviewed, the record shows that the prosecution's stated reasons for striking Scott and Brooks were not pretextual. A review of this record compels a conclusion that race did not play an impermissible role in the exercise of these strikes.

When we view the totality of the evidence discussed herein, as *Miller-El* directs, despite the lack of the trial court's active participation in voir dire and its failure to articulate particularized reasons for its determination that the State's proffered reasons were not pretextual, we find the trial court's decision to allow the strikes of Scott and Brooks was not clearly erroneous. Considering the evidence in the record before us, a contrary conclusion would be an improper substitution of this court's evaluation for that of the trial court similar to that struck down in *Collins*, —— U.S. ——, 126 S.Ct. at 973, 163 L.Ed.2d 824. The record before us simply does not demonstrate that a reasonable factfinder must necessarily conclude the prosecutor lied about his reasons for striking Scott or Brooks. Applying *Miller-El* and *Collins*, the prosecutor's demeanor was evaluated by the trial court which found no discriminatory intent. The explanations were rea-

sonable and the proffered rationale had some basis in accepted trial strategy.

We conclude defendant did not carry his ultimate burden of persuasion that the State exercised peremptory challenges in a purposefully discriminatory manner. We reiterate that Snyder's "proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent." *Snyder*, 98-1078 at 11, 750 So.2d at 842.

Accordingly, we reinstate the following decree.

DECREE

In accordance with the above reasons assigned by this court, we unconditionally affirm the judgment of the trial court and the sentence of death. In the event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that court denies his petition for certiorari; and either (a) the defendant, having filed for or and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that court denies his petition for rehearing, the trial judge shall, upon receiving notice from this court under LSA-C.Cr.P. art. 923 of finality of direct appeal, and before signing the warrant of execution as provided by LSA-R.S. 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under LSAR.S. 15:149.1; and (2) to litigate expeditiously the claims raised in that original application, if filed in the state courts.

AFFIRMED.

KIMBALL, J., dissents and assigns reasons.

CALOGERO, C.J., dissents for reasons assigned by KIMBALL, J.

JOHNSON, J., dissents and assigns reasons.

KIMBALL, J. dissenting.

I believe that a review of the entirety of this record performed using the vigorous analysis directed by the *Miller-El* Court reveals the trial court erred in allowing the State to peremptorily challenge Mr. Brooks. Consequently, I dissent from the majority's conclusion that defendant did not prove the State exercised peremptory challenges in a purposefully discriminatory manner.

At the outset, the raw numbers characterizing the selection of defendant's jury must be noted as they were in *Miller-El*. The State used five of its peremptory challenges to strike 100 percent of the African-American prospective jurors who survived challenges for cause. This resulted in defendant being tried by an all-white jury. Defendant argues that the State's use of "close to half" of its peremptory strikes to "exclude an entire group comprising only fourteen percent of the qualified pool" is compelling evidence that the State's strikes were made on the impermissible basis of race. While the fact that prosecutors used their peremptory strikes to exclude 100 percent of the eligible African-American panelists does not prove intentional racial discrimination, *Miller-El* cautions that " '[h]appenstance is unlikely to produce this disparity.' " *Miller-El*, 545 U.S. at 241, 125 S.Ct. at 2325 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 342, 123 S.Ct. 1029, 1042, 154 L.Ed.2d 931 (2003)). *See also State v. Trotter*, 280 Kan. 800, 127 P.3d 972, 981 (2006) ("[T]he

trial court must avoid placing a determinative emphasis on any one factor. Although the trial court can objectively compare numbers or other facts, it must subjectively evaluate the credibility of the prosecutor as he or she explains the reasons for each challenged strike.").

As explained by the majority, voir dire began against a backdrop of the issues of race and prejudice when the State made reference to the O.J. Simpson case. Following defendant's protests, the prosecutor assured the court that he would not refer to O.J. Simpson during the voir dire and evidentiary portion of trial. However, these representations appear disingenuous because the prosecutor clearly referenced the O.J. Simpson case during its rebuttal argument at the penalty phase of the trial.

Considering this injection of racial issues, and the fact that the prejudicial arguments were made to an all-white jury, I believe it is only reasonable to conclude that Mr. Brooks was peremptorily challenged by the State on the basis of his race when the entirety of the facts is considered. This is especially true in light of the fact that the trial court did not articulate its reasons for overruling the *Batson* challenge. While one may infer that the trial court found the State's reasons credible, this court, on appellate review, is not privy to the reasons for this credibility determination. One simply cannot tell whether it was something in the demeanor of the prosecution or in the behavior or attitude of Mr. Brooks that caused the trial court to believe the State's race-neutral reasons were not pretextual. The backstrike of Mr. Brooks followed the *Batson*-challenged peremptory strike of Ms. Scott, which had excluded the third of four African-American panelists to be examined. The State's backstrike of Mr. Brooks then removed the only African-American juror the State had accepted for service. With these circumstances as a backdrop, which *Miller-El* teaches are clearly relevant to the *Batson* analysis, the State's exercise of a peremptory challenge is suspicious.

The suspicions raised by the circumstances surrounding the exercise of the backstrike are not eased when the voir dire of Mr. Brooks is considered alone or when it is considered along with that of other panelists. The prosecutor stated he struck Mr. Brooks because he "looked very nervous" and the prosecutor was concerned that Mr. Brooks would vote in a way to avoid a penalty phase in order to go home quickly and miss less student teacher observation. However, the record reveals that when the trial court informed Mr. Brooks at the bench that Dr. Tillman did not see a problem as long as he missed only one week, Mr. Brooks simply responded, "Okay." He did not voice any further concerns or ask any questions. When the defense pointed out that Mr. Brooks did not seem to have lingering concerns once the trial court related Dr. Tillman's response, the State did not retort or further explain this justification. Most importantly, the prosecutors did not ask one question of Mr. Brooks concerning his student teaching commitments or whether he had any lingering time-related anxieties not dispelled by the trial court's inquiries of Dr. Tillman when they subsequently questioned him. Had Mr. Brooks's concern about his student teaching commitments genuinely mattered to the State, it would seem to reason that the State would have questioned him about it to determine the extent of his concern. On this subject, the *Miller-El* Court quoted *Ex parte Travis*, 776 So.2d 874, 881 (Ala.2000) as follows: "The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimina-

tion." *Miller-El*, 545 U.S. at 246, 125 S.Ct. at 2328.

It is possible the State had genuine concern about Mr. Brooks's state of mind despite his apparent acceptance of Dean Tillman's assurances to the trial court. *Collins*, — U.S. at —, 126 S.Ct. at 975 ("That the prosecutor claimed to hold such concerns despite Juror 16's *voir dire* averments does not establish that she offered a pretext."). However, there was no pre-strike foreshadowing of genuine State concern over the possibility of Mr. Brooks having time-schedule anxieties. No attempt was made by the State to verify its hypothesis and develop an objective basis for its strike. *See Miller-El*, 545 U.S. at 250, 125 S.Ct. at 2330–31 n. 8 ("[T]he failure to ask undermines the persuasiveness of the claimed concern."); *State v. Harris*, 01–0408 at p. 8, 820 So.2d at 476 ("[T]he fact that potential jurors are challenged on the basis of a claimed bias, without being questioned about such a bias, 'raises a strong inference that they were excluded on the basis of race alone.' ") (quoting *Williams v. State*, 548 So.2d 501, 507 (Ala.Cr.App.1988)).

The second justification the prosecutor gave for striking Mr. Brooks was that he "looked very nervous." Later, another prosecutor added that he was "very uncertain." Defense counsel immediately challenged the State's characterization of Mr. Brooks's demeanor, stating "[E]verybody out here looks nervous. I'm nervous." *Cf. State v. Hobley*, 98–2460, p. 21 (La.12/15/99), 752 So.2d 771, 784 ("Notably, trial counsel neither disputed the explanations of inattentiveness given by the prosecutor nor developed a record of evidence contradicting those explanations."). This can be taken to mean that, in defense counsel's view, Mr. Brooks looked no more nervous than any other panelist and was not unusually nervous-looking. The State did not respond to the challenge of its proffered reason by providing examples of Mr. Brooks's alleged nervousness, or by making a comparison of his alleged nervousness to the demeanor of other panelists that the State found acceptable. While it is true that the ultimate burden of persuasion on the *Batson* challenge remained with defendant, the State made no effort to demonstrate that its motivation for the strike was benign, or to develop a record of objective support for its characterization. This reason proffered by the State, the ensuing comment by defense counsel, and the State's lack of further justification highlight the difficulties faced by reviewing courts when the trial court does not state its firsthand observations for the record.

Without the independent assessment from the trial court verifying the accuracy of the State's generalized and conclusory characterization, the record contains no objective support for the State's demeanor-based justification. In fact, the record seems to indicate that Mr. Brooks was an engaged and voluble juror throughout voir dire examination. For example, Mr. Brooks asked defense counsel to explain the apparent contradiction between the presumption of innocence and the rule requiring a defendant to prove that he was legally insane at the time of the offense. With regard to another aspect of the presumption of innocence, a defendant's Fifth Amendment right to remain silent at trial, when defense counsel asked the panelists whether "anybody [can] think of a reason why a defendant might not testify," Mr. Brooks alone spoke up and volunteered that defendant "may say something to destroy his credibility by accident." Finally, when asked by defense counsel whether anyone on the panel had any experience with someone suffering from mental illness, Mr. Brooks explained, "I'm a future teacher, and I run into students who have

different problems, retardation, things like that." Answers and interactions such as these are not the kind that reasonably might be expected of someone who looked "very nervous" and "very uncertain." In the absence of the trial court's independent and particularized assessment of Mr. Brooks's demeanor, a reviewing court can only look to the record, which seems to indicate a lack of nervousness and uncertainty on the part of Mr. Brooks. Consequently, the State's proffered race-neutral reasons for striking Mr. Brooks are called into question.

16 The majority, relying on the Court's admonition in *Collins* that reviewing courts should not improperly substitute their evaluations of the record for that of the trial court, concludes that "nervousness cannot be shown from a cold transcript, which is why only the trial judge can evaluate the demeanor of the juror and why the judge's evaluation must be given much deference." At 496. In this case, however, the trial judge allowed the State's peremptory challenge of Mr. Brooks without any explanation whatsoever. In contrast, the trial court in *Collins* specifically stated:

> With regard to 016 [the panelist at issue], the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the District Attorney; however, Ms. 016 was a youthful person, as was [a white male juror the prosecutor also dismissed by peremptory challenge]. And one or more prospective jurors also. The [c]ourt is prepared to give the District Attorney the benefit of the doubt as to Ms. 016.

Rice v. Collins, 546 U.S. 333, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006). Thus, the trial judge in *Collins* made particularized findings regarding the prosecutor's proffered reasons. The trial judge in the instant case made no comment regarding Mr. Brooks's demeanor or his opinion of the trustworthiness of the prosecutor's explanations, even when the defendant immediately challenged the prosecutor's characterization of Mr. Brooks's demeanor. It is true that he allowed the peremptory challenge, but we are left with nothing but conjecture regarding his reasoning in the face of contrary characterizations of Mr. Brooks's demeanor by the State and the defendant. In my view, it is this lack of particularized reasons under these circumstances that distinguishes this case from *Collins*.

The credibility of the State's proffered reasons is called further into question when the strike of Mr. Brooks is compared with the State's treatment of panelists who 17 expressed similar concerns that could have caused them to vote in a way to shorten the trial if selected as a juror. After Mr. Brooks was excused, the fifth panel of prospective jurors included Michael David Sandras, a white teacher at University of New Orleans. In response to defense counsel questions related to whether any panelist had any personal reasons or pre-existing obligations that would make it difficult to serve on the jury or to concentrate during the trial, Mr. Sandras stated that the semester had just started the day before and that "any prolonged absence ... becomes a real problem." Mr. Sandras further conceded that he might have trouble concentrating on the trial "to some extent" because he was "responsible as far as the students, obviously, and I'd have to somehow pass on the information concerning work." The State did not attempt to explore Mr. Sandras's concerns by asking followup questions. Instead, the State accepted Mr. Sandras as a juror, who was then peremptorily challenged by the defense. That the defense peremptorily struck Mr. Sandras so that he did not serve on the jury is of no moment because the defense did not make

the decision to strike him until after the State made the decision to accept him. *See Miller-El*, 545 U.S. at 245, 125 S.Ct. at 2328 n. 4 ("The fact that Witt and other venire members discussed here were peremptorily struck by the defense is not relevant to our point. For each of them, the defense did not make a decision to exercise a peremptory until after the prosecution decided whether to accept or reject, so each was accepted by the prosecution before being ultimately struck by the defense. And the underlying question is not what the defense thought about these jurors but whether the State was concerned about [their] views ... when the venireperson was not black."). The State's complete lack of concern regarding Mr. Sandras's expressed worries about neglecting his teaching duties if he were selected to serve on the jury and its ultimate acceptance of him as a juror seem to indicate that its proffered reason for striking Mr. Brooks was pretextual and that it struck him because of his race.

Similarly, in response to the same questioning by defense counsel, Mr. Arthur Yeager, Jr., a white retired engineer, stated that he had "a longstanding commitment to an event that's going to take place on Sunday that I've been an integral part of for many years." Defense counsel informed Mr. Yeager that they should be finished by then. Mr. Yeager seemed to be appeased and stated he could make the necessary arrangements with a few telephone calls "and take care of my animals, too." The State asked no additional questions related to Mr. Yeager's concerns, and, along with the defense, accepted him as a juror.

In my view, the acknowledged time concerns of Mr. Sandras and Mr. Yaeger seem equally significant as the time concerns attributed to Mr. Brooks. The majority discounts the similarities among these potential jurors by pointing out that Mr. Brooks initiated the discussions regarding his concerns about missing his obligations, while Mr. Sandras and Mr. Yeager merely responded to questions. However, in no instance did the State question Mr. Sandras or Mr. Yeager about their admitted concern regarding the time they would spend in court, and away from their personal activities, if selected to serve on the jury. The State chose to strike only Mr. Brooks, in part because of his stated concerns about missing a portion of his student teaching duties. The similarities among Mr. Brooks, Mr. Sandras, and Mr. Yaeger, and the State's uneven treatment of these panelists does not make the State's proffered reasons for striking Mr. Brooks *per se* pretextual. Both Mr. Sandras and Mr. Yaeger may have exhibited legitimate traits and qualities that made the State believe they would make more desirable jurors than Mr. Brooks. *See Juniors*, 03-2425 at p. 31, 915 So.2d at 317-18; *State v. Collier*, 553 So.2d 815, 822 (La.1989). The factor that calls the State's strike of Mr. Brooks into question is the total lack of interest prosecutors exhibited in the admitted time concerns of Mr. Brooks, Mr. Sandras and Mr. Yaeger until it needed to justify with race-neutral reasons its strike of Mr. Brooks.

Miller-El directs that appellate courts cumulate all relevant items tending to point to purposeful discrimination and view them together when considering whether the trial court's determination of the existence of purposeful discrimination is clearly erroneous. The record shows that issues of racial prejudice existed at the outset of this case when defendant attempted to foreclose the possibility of the State mentioning the O.J. Simpson trial during his own trial. Defendant was tried by an all-white jury after the State used five of its peremptory strikes to chal-

lenge 100 percent of the eligible African-American panelists. In the absence of the trial court's independent and objective assessment on the record of Mr. Brooks's demeanor and attitude, the record tends to belie the prosecutor's stated race-neutral reasons for striking him. Rather than seeming uncertain and nervous, Mr. Brooks appears from a reading of the cold transcript to be engaged, forthcoming and communicative. Additionally, although the State offered the fact that Mr. Brooks might want to manipulate his deliberation to cut the trial short because of his stated concerns about missing his student teacher duties as a race-neutral reason for its strike, the State did not ask Mr. Brooks one question regarding this concern. Moreover, the State accepted without question on the issue at least two panelists who voiced similar concerns and might conceivably have the same motivation for cutting the trial short. Finally, we note that the State injected race into the proceedings directly when it did, in fact, mention the O.J. Simpson case during its penalty phase argument over the defendant's objection.

[10]When viewed in isolation, perhaps none of the factors above would constitute enough evidence to overturn the trial court's determination in light of the great deference afforded its factual determinations. However, the totality of the evidence discussed herein, combined with the lack of the trial court's active participation in voir dire and its failure to articulate particularized reasons for its determination that the State's proffered reasons were not pretextual, leads to the conclusion that the trial court's decision to allow the strike of Mr. Brooks was clearly erroneous. In my view, the cumulative evidence of pretext is compelling and too powerful to conclude anything but intentional racial discrimination motivated the State's strike of Mr. Brooks. Consequently, I would reverse defendant's conviction and sentence.

JOHNSON, Justice, dissenting and assigning reasons:

[11]When this case was first before this court on original review in *Snyder I*, 98-1078 (La.04/14/99);750 So.2d 832, I stated:

> I would have more confidence in the fairmindedness of this jury and the jury's pronouncement of the death sentence, had the state not used its peremptory challenges to exclude every African American juror, resulting in an all white jury for this black defendant. In my view, this violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), coupled with the prosecutor's inflammatory and prejudicial comparison of this case to the O.J. Simpson trial, require that we set aside the death sentence and remand the case for resentencing.

The Sixth Amendment to the United States Constitution gives a criminal defendant the right to a trial by a jury of his peers. I still believe that racial discrimination in the jury selection process offends the Equal Protection Clause of the Fourteenth Amendment and a pattern of strikes against African American jurors still gives rise to an inference of discrimination. Once the inference of discrimination is present, the prosecutor then has the burden of articulating a race-neutral explanation for striking the African American jurors. The trial judge serves as the gatekeeper, ensuring that racial prejudice, which impedes the securing of equal justice, does not invade our judicial system. As the gatekeeper, the trial judge must decide whether the prosecutor has articulated a genuine concern, or whether the reason articulated is merely a guise to accomplish his/her discriminatory purpose.

Verbalized facially neutral reasons can be a pretext for conscious or unconscious racism.

In the present case, the prosecutor's action in accepting the first African-American juror seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions. [12]Nonetheless, defense counsel noted in the record which excluded jurors were African-American. The *Batson* challenges to the remaining three African-American jurors, including the one juror who was accepted and later backstruck, were overruled by the trial court. The trial court accepted the prosecutor's "race-neutral" explanations and the majority found them to be "plausible, supported by the record and race neutral."

The prosecutor's discriminatory intent in excluding all African-Americans from the jury was evidenced by his reference to the O.J. Simpson trial during closing arguments. In *State v. Green*, 94-0887 (La.5/22/95), 655 So.2d 272, 287, we recognized that "for a *Batson* challenge to succeed, it is not enough that a racially discriminatory result be evidenced; rather, that result 'must ultimately be traced to a racially discriminatory purpose.' " Here we have a racially discriminatory result. An all-white jury selected by peremptorily excluding the five African-Americans from the venire, and the prosecutor's racially discriminatory purpose of inflaming the jury by referring to O.J. Simpson getting away with murder in California.

Because of the nationwide media focus on O.J. Simpson, the defense made a pre-trial motion to exclude any references to the O.J. Simpson case. This motion was denied by the trial judge based on the prosecutor's assurance that he would not, at any time during the course of taking evidence or before the jury, mention the O.J. Simpson case. It is blatantly clear that the prosecutor did not intend to keep his word. The prosecutor had no need to make reference to this defendant not getting away with murder during the penalty phase of the trial. At this point, the defendant had already been convicted of the crime, so there was nothing for him to "get away with." The prosecutor utilized the O.J. Simpson verdict to racially inflame the jury's passion to sentence this defendant to death. Such tactics leave no doubt in my mind that the prosecutor had a racially discriminatory purpose for excluding the African-American jurors.

During the hearing on the pre-trial motion to exclude references to the O.J. Simpson case, the following colloquy occurred:

Prosecutor:

Now, certainly, I can assure the Court that I'm not going to get up in my opening voir dire and say, "we're here for the Jefferson Parish O.J. Simpson court-case." I have no intentions of doing that. I have no-perhaps in argument, I don't know. I don't know. It might be inappropriate, but I think it's premature. And I can assure this Court I will make no reference to the O.J. Simpson case at any time during the course of the taking of any evidence in this case.

Defense Attorney:

That's-Judge, evidence is not what I'm worried about. I'm certain he's not going to ask any witnesses, "don't you think this is a whole lot like the O.J. Simpson case?" I'm concerned about Mr. Williams' famous arguments.

[13] . . .

Defense Attorney:

And I would ask that the court issue a ruling that Mr. Williams is not to refer

to this or to make comparisons in any way with the O.J. Simpson case and that he be held in contempt if he does that.

Prosecutor:

Judge, I ask the court to allow me, as an officer of this Court, to conduct this case in the proper manner, but in the way that I see fit. And, I have given the Court my word that I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case.... So, I have-I give the Court my word that I won't do this. I just ask you not to grant this motion.

....

The Court:

Based on Mr. Williams' representations, I'm going to deny your motion.

The defense argues that the prosecutor's comments on the O.J. Simpson verdict to this all white jury were devastating and requires that the conviction be reversed. While there is much evidence that the majority of white Americans believed O.J. Simpson was guilty of murdering his wife and that he "got away with it," the prosecutor's improper comments during the penalty phase do not implicate the trial phase.

The defendant's own confession, plus the testimony of his ex-wife, Mary Snyder who survived this brutal attack, along with that of Gwen Williams, the witness who came to the aid of Ms. Snyder during the attack, support the defendant's conviction of first degree murder. The prosecutor's improper and clearly inflammatory comments did, however, create a substantial risk that the death penalty would be imposed. In my opinion, the defendant's death sentence should be set aside and this matter remanded for re-sentencing.

The United States Supreme Court granted defendant's writ of habeas corpus, vacated the judgment of this court and remanded the case to the Court to reconsider defendant's *Batson* claims in light of its recent opinion in *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). In *Miller-El*, the Supreme Court reaffirmed its position that racial discrimination by any state in jury selection offends the Equal Protection Clause of the 14th Amendment to the United States Constitution. This rule is meant to ferret out discrimination from our judicial system.

In this case, the majority's opinion concludes that although the prosecution is required by *Batson* to give race neutral reasons for a peremptory challenge, the race neutral reasons need not be *persuasive* or even *plausible*. The trial court need only find the prosecution's race neutral explanations to be *credible*. They conclude that the burden of proof never shifts from the defendant who must prove the State's discriminatory intent.

The difficulty for trial courts has always been separating out reasons that are legitimate, from those that are merely pretextual. *Miller-El* suggests some tools to use in determining whether the proffered race neutral reasons are pre-textual. First, we should look at the number. In *Miller-El*, out of twenty(20) black members included in the one-hundred and eight (108) person venire panel, only one (1)actually served as a juror. Here, nine (9) of the eighty-five (85) prospective jurors were black. Four(4) were dismissed for cause and five(5) were removed by the State with peremptory challenges. One of the two alternate jurors was black, but she did not participate in the jury's deliberations.

Secondly, *Miller-El* suggests we must do a side-by-side comparison of the black jurors who were struck and the white ju-

rors who were allowed to serve. Any patterns of disparate treatment or questioning with regard to the death penalty should lead to the conclusion that the questioning was intended to exclude black venire members, despite any race neutral reasons proffered to the contrary. The trial court's job is to determine whether the reasons are credible, or even plausible.

Next, *Miller-El* suggests that we go beyond the comparisons to look at broader patterns of discriminatory practices during the jury selection process. In *Miller-El*, the Court concluded that the first clue to the prosecutor's discriminatory intent could be found in their resort during voir dire to a procedure known in Texas as the "jury [1]shuffle." The record showed that the Dallas County District Attorney's Office used the jury shuffle to manipulate the racial composition of the jury and avoid reaching prospective black panel members.

Louisiana does not have the "jury shuffle," but we do have a practice that can be used in an equally discriminatory fashion. Louisiana allows parties to use peremptory challenges to "back strike" jurors pursuant to LSA–C.Cr.P. art 795.[1]

In *State v. Plaisance*, 00–1858 (La. App.4Cir.3/6/02), 811 So.2d 1172, *rehearing denied*, the Fourth Circuit concluded that the trial court's error in not allowing back strikes and the method employed in exercising challenges was harmless; the guilty verdict rendered was unattributable to the errors. In *State v. Watts*, 579 So.2d 931 (La.1991), the Court granted a writ of certiorari with an order stating: "A juror temporarily accepted and sworn in accordance with LSA–C.Cr.P. Art. 788 may nevertheless be challenged peremptorily prior to the swearing of the jury panel in accordance with LSA–C.Cr.P. Art. 790. LSA–C.Cr.P. Art. 795(B)(1)." *See also State v. Taylor*, 93–2201 (La.2/28/96), 669 So.2d 364, 376 ("peremptory challenges are exercisable at any time before the jury panel is sworn,") citing LSA–C.Cr.P. arts. 788, 790, 795(B)(1).

In this case, the State used its seventh peremptory challenge to back strike Jeffery Brooks, who had initially been accepted in the first panel of prospective jurors called for examination. Upon the defense's *Batson's* challenge to the State's later backstrike of Mr. Brooks, the State responded that Mr. Brooks was very uncertain, and "looked nervous to me throughout the questioning," and that Mr. Brooks's concern about missing class as a student teacher might lead him "to go home quickly, [2]come back with guilty of a lesser verdict so there would not be a penalty phase." The trial court allowed the peremptory challenges without a ruling as to whether the State's explanation was race-neutral or credible.

The *Batson* violations herein resulted in the defendant being denied his right to be tried by a jury of his peers. In *Snyder I*, I was of the opinion that these *Batson* violations required a setting aside of the death penalty, but not the conviction(guilt phase), since the evidence seemed to be persuasive. Now, I am of the opinion that these flagrant *Batson* violations require that the defendant's conviction and sentence must be set aside, and the case remanded for a new trial. The defendant in a capital case is entitled under the Sixth and Fourteenth Amendments to an impartial jury in both the guilt and the penalty phase. *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 191 L.Ed.2d 492(1992).

1. Back striking refers to a party's exercise of a peremptory challenge to strike or excuse a prospective juror after initially accepting him, but prior to the final swearing of the jury panel.

For the aforementioned reasons, I respectfully, dissent.

1

2006-0097 (La. 10/17/06)

Sylvanus Gordon REESE & Lola Reese

v.

LIBERTY MUTUAL INSURANCE COMPANY.

No. 2006–C–0097.

Supreme Court of Louisiana.

Oct. 17, 2006.

On Writ of Certiorari to the Court of Appeal, First Circuit, Parish of St. Tammany.

John M. Robin, Covington, for Applicant.

Barrasso, Usdin, Kupperman, Freeman & Sarver, New Orleans, Meredith A. Cunningham, Judy Y. Barrasso, for Respondent.

PER CURIAM.

We granted plaintiffs' application for a writ of certiorari in this case on May 5, 2006. After hearing oral arguments on September 6, 2006 and reviewing the record of the matter, we conclude the judgment below does not require the exercise of this court's supervisory authority. Accordingly, we recall our order of May 5, 2006 as improvidently granted, and we deny plaintiffs' writ application.

2

2005-1594 (La. 10/17/06)

Yata JACKSON, Individually, Troy Jackson, Individually, and Yata Jackson and Troy Jackson on Behalf of their Minor son, Troy Williams, II

v.

TULANE MEDICAL CENTER HOSPITAL AND CLINIC and its Employees, and Dabney J. Hamner, Jr., M.D. and ABC Insurance Company.

No. 2005–C–1594.

Supreme Court of Louisiana.

Oct. 17, 2006.

Rehearing Denied Dec. 15, 2006.

Background: Parents brought medical malpractice action against hospital and obstetrics and gynecology resident, alleging that negligence in the performance of amniocentesis caused infant to be born with eye injury that rendered infant blind in one eye. The District Court, Parish of Orleans, entered judgment on jury verdict in favor of defendants. Parents appealed. The Court of Appeal reversed and rendered judgment for parents. Defendants filed petition for writ of certiorari.

Holding: The Supreme Court, Kimball, J., held that jury's finding that defendants did not breach the standard of care was not manifestly erroneous.

Judgment of the court of appeal reversed; judgment of the trial court reinstated.

Johnson and Weimer, JJ., dissented and assigned reasons.

Calogero, P.J., and Johnson and Weimer, JJ., would grant a rehearing.

1. Appeal and Error ⇐999(1)

Under the manifest error standard of review, a factual finding cannot be set

APPENDIX B

Supreme Court
STATE OF LOUISIANA
New Orleans

PASCAL F. CALOGERO, JR.
CHIEF JUSTICE

JOHN TARLTON OLIVIER
CLERK OF COURT

400 ROYAL STREET
NEW ORLEANS, LA 70130

TELEPHONE (504) 310-2300
HOME PAGE http://www.lasc.org

December 15, 2006

Jelpi Pierre Picou, Jr. Esq.
636 Baronne Street
New Orleans, LA 70113

In Re: State of Louisiana
Vs.
Allen Snyder
No. 1998-KA-1078

Dear Counsel:

Enclosed please find a News Release documenting this court's denial of the application for rehearing, in the above entitled referenced case.

With kindest regards, I remain,

Very truly yours,

John Tarlton Olivier
Clerk of Court
Katherine A. Fontana
By: Katherine A. Fontana
Deputy Clerk of Court

KAF/jdh
Enclosure
cc: Hon. Paul D. Connick, Jr.
Hon. Kernan A. Hand
Marcia Adele Widder, Esq.
Aneel Lachman Chablani, Esq.
Alfred Adolphe Olinde, Jr., Esq.
Hon. Jon Gegenheimer
Terry Michael Boudreaux, Esq.
Hon. Charles C. Foti, Jr.
James Alan Williams, Esq.

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE — NEWS RELEASE # 071

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the 15th day of December, 2006, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

APPLICATIONS FOR REHEARING NOT CONSIDERED:

2006-C -0097 — SYLVANUS GORDON REESE & LOLA REESE v. LIBERTY MUTUAL INSURANCE COMPANY (Parish of St. Tammany)
See Supreme Court Rule IX, § 6.

2006-B -0727 — IN RE: MACK I. FRANK
Not considered; not timely filed. Judgment is definitive. La. Code Civ. P. Art. 2167; Supreme Court Rule XIX, § 26 (E).

REHEARINGS DENIED:

1998-KA-1078 — STATE OF LOUISIANA v. ALLEN SNYDER (Parish of Jefferson)
CALOGERO, C.J., would grant a rehearing.
KIMBALL, J., would grant a rehearing.
JOHNSON, J., would grant a rehearing.

2005-C -0470 — WAYNE COSBY, KARI FITZGERALD, JOHN FITZGERALD, STAN MCDONALD, KEITH STEVENS, KAREN WILLIAMS, CARL WILLIAMS, AND PETER OELSCHLAEGER v. HOLCOMB TRUCKING, INC., HENRY H. HOLCOMB, AND JOYCE H. HOLCOMB (Parish of Livingston)
KNOLL, J., would grant a rehearing.

2005-C -1594 — YATA JACKSON, INDIVIDUALLY, TROY JACKSON, INDIVIDUALLY, AND YATA JACKSON AND TROY JACKSON ON BEHALF OF THEIR MINOR SON, TROY WILLIAMS, II v. TULANE MEDICAL CENTER HOSPITAL AND CLINIC AND ITS EMPLOYEES, AND DABNEY J. KAMNER, JR., M.D. AND ABC INSURANCE COMPANY (Parish of Orleans)
CALOGERO, C.J., would grant a rehearing.
JOHNSON, J., would grant a rehearing.
WEIMER, J., would grant a rehearing.

2005-C -2274 — DENHAM SPRINGS ECONOMIC DEVELOPMENT DISTRICT v. ALL TAXPAYERS, PROPERTY OWNERS AND CITIZENS OF THE DENHAM SPRINGS ECONOMIC DEVELOPMENT DISTRICT, AND NONRESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN, AND ALL OTHER PERSONS INTERESTED IN OR AFFECTED IN ANY WAY BY THE ISSUANCE OF NOT TO EXCEED $50,000,000 DENHAM SPRINGS ECONOMIC DEVELOPMENT DISTRICT SALES TAX INCREMENT BONDS (BASS PRO SHOPS PROJECT) IN ONE OR MORE SERIES, THE MEANS PROVIDED FOR THE PAYMENT AND SECURITY THEREOF AND RELATED MATTERS (Parish of Livingston)

APPENDIX C

98-1078 (La. 4/14/99)

STATE of Louisiana

v.

Allen SNYDER.

No. 98-KA-1078.

Supreme Court of Louisiana.

April 14, 1999.

Defendant was convicted in the Twenty-Fourth Judicial District Court, Parish of Jefferson, No. 98-KA-1078, Kernan A. Hand, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, Kimball, J., held that: (1) trial court had duty to investigate competency to stand trial; (2) failure to investigate claims of incompetency required remand for determination of the possibility of a nunc pro tunc hearing on competency; (3) evidence supported conviction; (4) prosecutor gave race-neutral reasons for peremptory challenges; (5) photographs of non-fatal wound to murder victim's face were admissible; (6) any error in admitting ten-year-old photographs of defendant holding knife in martial arts poses was harmless; (7) reversal was not required by prosecutor's closing argument that case was similar to famous murder case against O.J. Simpson; and (8) attorneys has sufficient time to prepare.

Conditionally affirmed, and case remanded.

Lemmon, J., concurred in part, dissented in part, and assigned reasons.

Victory, J., concurred in part, dissented in part, and assigned reasons joined by Traylor, J.

Johnson, J., dissented and assigned reasons.

1. Homicide ⇐39

"Sudden passion" and "heat of blood" are not elements of manslaughter; rather, they are mitigatory factors in the nature of a defense and exhibit a degree of culpability less than that present when the homicide is committed in the absence of these factors. LSA-R.S. 14:31, subd. A(1).

2. Homicide ⇐239

A defendant who establishes by a preponderance of the evidence that he killed in "sudden passion" or "heat of blood" is entitled to a verdict of manslaughter in a murder prosecution. LSA-R.S. 14:31, subd. A(1).

3. Homicide ⇐253(3)

Evidence established first-degree murder, rather than manslaughter, when defendant repeatedly stabbed victim in car with defendant's wife, even though jury was aware of the defendant's marital difficulties, wife's extramarital affair with victim, and plan to discuss reconciliation; defendant's conflicting statements undercut manslaughter theory, and defendant's own confession and the testimony of two witnesses demonstrated that defendant waited and watched the victim and his wife. LSA-R.S. 14:30, subd. A(3), 14:31, subd. A(1).

4. Homicide ⇐253(6)

Sufficient evidence to support conviction for first-degree murder based on specific intent to kill or inflict great bodily harm upon more than one person supports aggravating circumstance that defendant knowingly created a risk of death or great bodily harm to more than one person. LSA-R.S. 14:30, subd. A(3); LSA-C.Cr.P. art. 905.4, subd. A(4).

5. Criminal Law ⇐1035(5)

Defendant waived any claim based upon the prosecutor's use of peremptory challenges against African-American prospective jurors, where he never requested race-neutral explanation. LSA-C.Cr.P. art. 841.

6. Constitutional Law ⇐221(4)
Jury ⇐33(5.15)

Perceived desire of student teacher to avoid penalty phase by voting for non-capital offense and two jurors' statements and beliefs about the death penalty were race-neutral reasons for peremptory challenges against African-American prospective jurors; thus, the challenges did not violate equal protection clause. U.S.C.A. Const.Amend. 14.

7. Jury ⇐33(5.15)

The issue of whether the defense established a prima facie case of discrimination is moot once the prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination.

8. Jury ⇐33(5.15)

Any response by prosecutor will qualify as race neutral reason for exercising peremptory challenge unless a discriminatory intent is inherent in the prosecutor's explanation. U.S.C.A. Const.Amend. 14.

9. Criminal Law ⇐641.13(2.1)

Attorney did not prejudice defendant and, therefore, did not render ineffective assistance by failing to object to peremptory challenges to exclude African Americans; the Batson rule applying the equal protection clause did not have a fundamental impact on the integrity of factfinding. U.S.C.A. Const.Amends. 6, 14.

10. Criminal Law ⇐1162

Violating a rule that does not have a fundamental impact on the integrity of factfinding does not render the trial unfair and the verdict suspect.

11. Criminal Law ⇐661

The State is entitled to the moral force of its evidence.

12. Criminal Law ⇐438(6)

Postmortem photographs of murder victims are admissible to prove corpus delicti and to corroborate other evidence establishing cause of death and location and placement of wounds, as well as to provide positive identification of the victim.

13. Criminal Law ⇐438(7)

Photographic evidence will be admitted unless it is so gruesome that it overwhelms the jurors' reason and leads them to convict defendant without sufficient other evidence, i.e., when the prejudicial effect of the photographs substantially outweighs their probative value. LSA–C.E. art. 403.

14. Criminal Law ⇐438(7)

Probative value of graphic photographs of non-fatal wound to murder victim's face outweighed any prejudicial effect in capital murder prosecution; the photos illustrated the number and location of stab wounds and supported inference of specific intent to kill or to inflict great bodily harm. LSA–C.E. art. 403.

15. Criminal Law ⇐1169.1(10)

Any error in admitting ten-year-old photographs of defendant holding knife in martial arts poses was harmless at the guilt phase of capital murder prosecution; eyewitness and defendant's estranged spouse described defendant's brutal stabbing of victim and spouse, and defendant confessed.

16. Homicide ⇐343

Any error in admitting ten-year-old photographs of defendant holding knife in martial arts poses was harmless at the penalty phase of a capital murder prosecution; eyewitness and defendant's estranged spouse described defendant's brutal stabbing of victim and spouse, defendant confessed, and evidence indicated that he had hit his wife with a baseball bat, threatened to hit her with a hammer, slammed her head into a bedroom wall, smashed her head against a windshield, and stabbed her with a screwdriver.

17. Criminal Law ⇐1177

An error committed in the penalty phase of a capital case is harmless if the sentence is surely unattributable to the error.

18. Criminal Law ⇐723(1)

Prosecutor's closing argument that capital murder case against African-American defendant was similar to famous murder case against O.J. Simpson and that defendant was not really suicidal did not require reversal in penalty phase.

19. Criminal Law ⇐713

A prosecutor retains considerable latitude when making closing arguments. LSA–C.Cr.P. art. 774.

20. Criminal Law ⇐1171.1(2.1)

A conviction or sentence will not be reversed for improper closing argument unless appellate court is thoroughly convinced the remarks influenced the jury and contributed to the verdict.

21. Criminal Law ⇐589(1)

Whether a refusal to grant a continuance was justified depends on the circumstances of the particular case presented. LSA–C.Cr.P. art. 712.

22. Criminal Law ⇐1166(7)

Generally, Supreme Court declines to reverse convictions for improper denial of a motion to continue absent a showing of specific prejudice. LSA–C.Cr.P. art. 712.

23. Criminal Law ⇐578

Limits on the court's discretion to grant or deny a continuance are imposed by defendant's constitutional rights, including his rights to understand the proceedings against him, to assist in his defense, and to receive the assistance of counsel. U.S.C.A. Const.Amend. 6; LSA–C.Cr.P. art. 712.

24. Constitutional Law ⇐268.2(2)

Due process permits the trial of an accused only when he is legally competent. U.S.C.A. Const.Amend. 14.

25. Constitutional Law ⇐268.2(2)

The due process test for determining defendant's mental competency to stand trial depends upon whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. U.S.C.A. Const.Amend. 14.

26. Criminal Law ⇐625.10(2.1)

Defense attorney's statement that she was experiencing difficulty communicating with defendant and medical evidence that defendant needed approximately six weeks to receive maximum benefit from new antidepressant medication obligated court to investigate competency to stand trial, even though attorney apparently conceded competency and psychiatrist and psychologist believed that defendant was able to understand proceedings against him. U.S.C.A. Const.Amend. 14.

27. Criminal Law ⇐625.10(3)

If there is a sufficient doubt as to the mental competency of an accused to stand trial, the trial court has a responsibility to order a hearing sua sponte. U.S.C.A. Const.Amend. 14.

28. Constitutional Law ⇐268.2(2)

Due process right to adequate procedures for preventing trial while incompetent is violated when, in light of facts known to the trial court, the failure to make further inquiry into defendant's competence denies him a fair trial; the relevant question is whether the trial judge received information which, objectively considered, should reasonably have raised a doubt about competency and alerted the judge to the possibility that the defendant could not understand the proceedings, appreciate their significance, or rationally aid his attorney. U.S.C.A. Const.Amend. 14.

29. Constitutional Law ⇐268.2(2)

The due process right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination. U.S.C.A. Const.Amend. 14; LSA–C.Cr.P. art. 642.

30. Mental Health ⇐432

The facts to consider in determining a defendant's ability to assist in his defense

include possible deterioration of mental condition under the stress of trial and defendant's ability to recall and relate facts pertaining to his actions and whereabouts at certain times, assist counsel in locating and examining relevant witnesses, maintain a consistent defense, listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements, make simple decisions in response to well-explained alternatives, and testify in his own defense. U.S.C.A. Const.Amend. 14.

31. Criminal Law ⇐1181.5(4)

Trial court's erroneous failure to investigate defendant's claims of incompetency to stand trial required remand for determination of the possibility of a nunc pro tunc hearing to determine competency at trial, required such a hearing, if a meaningful inquiry into defendant's competency was still possible, and entitled defendant to new trial if defendant was incompetent or meaningful inquiry was impossible.

32. Criminal Law ⇐1166(7)

The denial of a motion for continuance on grounds of counsel's lack of preparedness does not warrant reversal unless counsel demonstrates specific prejudice resulting from the denial or the preparation time is so minimal as to call into question the basic fairness of the proceeding.

33. Homicide ⇐343

Four weeks to prepare for the penalty phase of capital murder prosecution was not so unreasonably short as to call into question the basic fairness of the proceeding; thus, defense counsel was required to demonstrate specific prejudice resulting from the denial motion for continuance.

34. Criminal Law ⇐1166(7)

Four months was sufficient time to prepare for guilt phase of capital murder prosecution; thus, counsel was required to show specific prejudice resulting from the denial motion for continuance.

35. Criminal Law ⇐998(8)

A claim of ineffective assistance of counsel is generally raised in an application for post-conviction relief. U.S.C.A. Const.Amend. 6.

36. Criminal Law ⇐598(2)

A subpoena is generally necessary to show "due diligence" within the meaning of article which requires a motion for a continuance based upon the absence of a witness to state facts showing due diligence. LSA-C.Cr.P. art. 709.

See publication Words and Phrases for other judicial constructions and definitions.

37. Criminal Law ⇐935(1)

A motion for new trial presents only the issue of the weight of the evidence. LSA-C.Cr.P. art. 851.

38. Homicide ⇐357(7)

Death sentence based on aggravating circumstance of risking death or great bodily harm to more than one person would not be disproportionate for 37-year-old defendant who injured estranged wife and fatally stabbed her companion. LSA-Const. Art. 1, § 20; LSA-C.Cr.P. arts. 905.4, subd. A(4), 905.9; LSA-Sup.Ct. Rules, Rule 28, 8 LSA-R.S.

39. Criminal Law ⇐1208.1(6)

If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. LSA-C.Cr.P. art. 905.9; LSA-Sup.Ct.Rules, Rule 28, 8 LSA-R.S.

Marion B. Farmer, Covington, Counsel for Applicant.

Richard P. Ieyoub, Attorney General, Paul D. Connick, Jr., District Attorney, James Alan Williams, Alfred Adolphe Olinde, Jr., Counsel for Respondent.

KIMBALL, Justice. *

On August 29, 1996, a jury convicted defendant, Allen Snyder, of the first degree murder of Howard Wilson. One day later, after the penalty phase hearing, the

* CALOGERO, C.J., not on panel. See Rule IV, Part 2, Section 3.

jury unanimously determined that defendant should receive the death penalty. Defendant was subsequently sentenced to death by the trial judge in accordance with the jury's determination. Pursuant to La. Const. Art. 5, § 5(D), defendant appeals his conviction and sentence, arguing five assignments of error.[1] Because we find error in the trial court's failure to investigate defendant's request for a continuance based upon a claim of incompetence caused by his alleged inability to assist his counsel due to a change in his medication that left him mentally unstable at the time of trial, we remand this case to the trial court for a hearing to determine whether a retrospective determination of defendant's competence is still possible. If such a determination is, in fact, possible, the trial court shall hold a hearing to determine whether defendant was competent at the time of trial. If the trial court finds that defendant was competent, no new trial is required as we find none of defendant's other assignments of error have merit and therefore conditionally affirm his conviction and sentence. If the trial court finds that a retrospective determination of defendant's competence cannot be had, or, if after hearing evidence, determines that defendant was not competent at the time of trial, defendant shall be entitled to a new trial.

FACTS

Defendant, Allen Snyder, and his wife, Mary Snyder, were having marital difficulties in the summer of 1995. Towards the end of their relationship, neither partner remained entirely faithful to the other. After several incidents of physical abuse at the hands of her husband, Mary Snyder took their children and went to live with her mother. Despite this separation, defendant contacted Mary one evening in mid-August and the two discussed the possibility of getting back together. Mary agreed to meet defendant the following day to discuss a reconciliation. Defendant was anxious to meet with Mary and wanted to see her that evening, but she put him off, telling him she "didn't want to see him" that night. Rec. vol. 6, p. 1267.

Instead, Mary went out on a late night date with Howard Wilson, a married man she claimed she had recently met. Defendant repeatedly tried to page her during the evening, but Mary refused to respond. At the end of their date, at approximately 1:30 a.m. on August 16, 1995, Howard Wilson pulled his vehicle up to the home of Mary's mother to drop Mary off. Defendant walked up to the car, opened the driver's side door of the vehicle, and attacked both Howard Wilson and Mary Snyder with some sort of knife containing a double-edged blade. He inflicted nine wounds upon Howard Wilson and nineteen wounds upon Mary Snyder.

Gwen Williams witnessed the assault. She testified that she observed defendant stooped down beside a trailer that was across the street from the home of Mary's mother. She then saw defendant run from the trailer to Wilson's car, open the car door, jump into the car and attack Howard Wilson and Mary Snyder. Williams screamed at defendant which caused him to run away. Williams then helped Mary to her mother's house and the police were called. Howard Wilson died at East Jefferson Hospital. Mary Snyder survived the attack and testified at trial.

Approximately twelve hours later, defendant called the police claiming he was suicidal. The police went to his house to investigate, initially unaware of the fact that he was a murder suspect, and found defendant barricaded in his house and curled into a fetal position on the floor. Police officers then took defendant to the Criminal Investigations Bureau and, after advising him of his rights, took a statement from defendant. In his statement, defendant claimed he went to Mary's mother's house "to see where she was and who she was with." Transcribed Audio

1. Because each of defendant's five assignments of error was briefed and argued, this opinion contains no unpublished appendix.

Tape Statement, p. 3. He stated he brought a knife to "scare her, make 'em talk to me." *Id.* He told police that he approached the car not knowing whether Mary was inside the car or not. He opened the car door with the knife in hand and, according to his statement, told Howard Wilson they needed to talk. A scuffle then ensued. Defendant told police he was "out of control" at that time. *Id.* at 5. After the attack, defendant ran off, throwing the knife down somewhere along the way.

The state subsequently charged Allen Snyder with one count of first degree murder. After the trial, which began on August 27, 1996, a jury found defendant guilty as charged. After finding the presence of one aggravating circumstance,[2] the same jury unanimously determined defendant should receive the death penalty. A sentence of death was subsequently imposed by the trial court.

LAW AND DISCUSSION

Assignment of Error No. 1

In his first assignment of error, defendant argues that the evidence presented at trial did not support a conviction for first degree murder, but rather one for manslaughter. This claim is based upon the contention that defendant came upon the victim and Mary Snyder when they were engaged in a sexual act in the victim's car which was parked outside the home of Mary's mother.[3] Defendant maintains that when he saw his wife involved in sexual relations with another man, he was provoked to the point of losing his self-control and cool reflection.[4]

[1, 2] Manslaughter is a homicide which would be either first or second degree murder, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. La. R.S. 14:31(A)(1).[5] It is the presence of "sudden passion" and "heat of blood" that distinguishes manslaughter from murder. This court has repeatedly stated, however, that "sudden passion" and "heat of blood" are not elements of the offense of manslaughter. Rather, they are mitigatory factors in the nature of a defense which exhibit a degree of culpability less than that present when the homicide is committed in the

2. Specifically, the jury found that:

> The offender knowingly created a risk of death or great bodily harm to more than one person.

Rec. vol. 1, p. 196.

3. No evidence of sexual activity between Mary Snyder and Howard Wilson was presented in the guilt phase of defendant's trial. In the penalty phase, however, two state experts testified that defendant told them that when he opened the car door, he saw his wife performing a sexual act with the victim. Rec. vol. 7, pp. 1534, 1546.

4. The defense claims that defendant came upon Mary Snyder and Howard Wilson while they were engaged in a sexual act in Wilson's car. Appellate counsel argues that had this information been fully investigated and presented to the jury, the mitigatory factors of provocation sufficient to deprive an average person of his self-control and cool reflection would have been proved by a preponderance of the evidence. However, no such evidence was presented by the defense in the guilt phase of defendant's trial. Counsel also argues in this assignment of error that the trial court erred in denying defendant a continuance which would have allowed defense counsel time to investigate this aspect of a manslaughter defense and would have allowed defendant time to stabilize on new anti-depressant medication. This argument is treated in our discussion of defendant's assignments of errors dealing with the trial court's failure to grant a continuance.

5. La. R.S. 14:31(A)(1) defines manslaughter as:

> A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed;

absence of these factors. *State v. Lombard*, 486 So.2d 106 (La.1986); *State v. Tompkins*, 403 So.2d 644 (La.1981). Because they are mitigatory factors, a defendant who establishes by a preponderance of the evidence that he acted in "sudden passion" or "heat of blood" is entitled to a verdict of manslaughter. *Lombard*, 486 So.2d at 111.

[3] Defendant argues that "some evidence" was introduced that established that defendant committed the crime in sudden passion or heat of blood. In reviewing this contention, we must [5] determine whether a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found that the mitigatory factors were not established by a preponderance of the evidence. *Lombard*, 486 So.2d at 111. *See also Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The defense argues the jury was aware of the marital difficulties between defendant and Mary Snyder, of Mary's extramarital affair and instances of domestic abuse as a result of those affairs. Furthermore, the jury heard evidence that defendant wanted a reconciliation with Mary and that she was open to such a possibility. Finally, the jury was aware that defendant had paged Mary continuously before the murder in an attempt to contact her. The defense maintains that defendant's discovery of his wife on a late date with the victim, after she had made reconciliation plans with defendant, sufficed to deprive him of his self-control and cool reflection.

Although "some evidence" presented at trial supported a conclusion that the victim and defendant's wife were on a date, there was no evidence presented to support a determination that the two were involved in any type of sexual activity when defendant came upon them. Additionally, defendant's conflicting accounts of the incident make it difficult to determine his true motivation for the act. Defendant told police one version of the events and defense doctors yet another. The conflicting accounts given by defendant after the murder do not constitute affirmative, substantive evidence of his guilt, *State v. Savoy*, 418 So.2d 547 (La.1982), but they undoubtedly undercut the reasonableness of the principal defense theory of manslaughter.

[4] The State theorized that defendant was a remorseless killer who repeatedly stabbed his wife and the victim then fled the scene, disposed of the murder weapon and created a flimsy suicide theory when he decided to turn himself in to the police. The prosecution presented evidence which established beyond a reasonable doubt that the defendant was guilty of first degree murder. Defendant's own confession and the testimony of two witnesses demonstrated that defendant waited and watched the victim and his wife and then approached them, while armed with a knife, on his own accord. According to defendant, he suggested that the three of them "talk." No talking ever occurred, however. Instead, as both Mary Snyder and Gwen Williams testified, defendant brutally stabbed his wife and Howard Wilson and then fled from the scene. Consequently, the verdict reflects the evidence admitted at trial. Jurors may rationally [6] have concluded either that (1) defendant lied about the circumstances of the offense to excuse what the evidence otherwise overwhelmingly demonstrated, a specific intent homicide during a controversial course of action in which he also specifically intended to kill or to inflict great bodily harm on at least one other person (*i.e.*, his estranged wife); or (2) that a reasonable person would not have been provoked to homicidal passion by the sight of his estranged wife with another man. In either case, the evidence supported the jury's verdict and rejection of the defendant's manslaughter defense.[6]

6. The substantive definition of first degree murder under La. R.S. 14:30(A)(3) differs critically from the aggravating circumstance in La.C.Cr.P. art. 905.4(A)(4). The latter requires proof that the offender "knowingly created a risk of death or great bodily harm to more than one person" while the former requires proof that the offender had the "specific intent to kill or to inflict great bodily harm

Assignment of Error No. 2

Batson Claim

In his second assignment of error, defendant argues that the trial court erred in allowing the State to exercise five of its peremptory challenges against black prospective jurors in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Specifically, defendant contends that prospective jurors Jeffrey Brooks, Greg Scott, Thomas Hawkins, Jr., Elaine Scott, and Loretta Walker were impermissibly excluded by the State. The record of the voir dire proceedings reveals that the prosecutor used peremptory challenges to strike every African American called as a prospective juror who survived challenges for cause. This resulted in an all-white jury for the defendant, who is African-American.

Under *Batson* jurisprudence, a defendant must first establish a prima facie case of discrimination by showing facts and relevant circumstances that raise an inference that the prosecutor used his peremptory challenges to exclude potential jurors on the basis of race. If such a showing is made, the burden of production then shifts to the State to articulate a race-neutral explanation for the challenges. Finally, the trial court must determine whether the defendant carried his burden of proving purposeful discrimination. *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (Per Curiam); *see State v. Collier*, 553 So.2d 815 (La. 1989). The second step does not require an explanation that is persuasive, or even plausible, and unless a discriminatory intent is inherent in the State's explanation, the reason offered will be deemed race neutral. *Purkett*, 514 U.S. at 767, 115 S.Ct. at 1771. The ultimate burden of persuasion remains on the defendant to prove purposeful discrimination. *See State v. Green*, 94-0887, p. 28 (La.5/22/95), 655 So.2d 272, 290, and cases cited therein. A trial judge's determination pertaining to purposeful discrimination rests largely on credibility evaluations; therefore the trial judge's findings are entitled to great deference by the reviewing court. *Batson*, 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21.

[5] As an initial matter, the defense failed to lodge an objection to the State's use of its peremptory challenges against jurors Greg Scott and Thomas Hawkins, Jr., although counsel did note for the record that both jurors were African-American.[7] According to defense counsel, when Scott and Hawkins were struck by the State, counsel felt that no "pattern" of exclusion had emerged because the State had accepted an African-American juror, Jeffery Brooks (who was later backstrick-

upon more than one person." A finding under La. R.S. 14:30(A)(4) will always support the existence of the aggravating circumstances in Article 905.4(A)(4), but the converse is not necessarily true. *See State v. Ortiz*, 96-1609, p. 17 (La.10/21/97), 701 So.2d 922, 933 ("For purposes of the guilt phase of the trial, it was not sufficient for the jury to find that defendant merely created a risk of the death of more than one person. The statute required the jurors to find that defendant actively desired the result that followed from his actions."). In this case, rational jurors could find on the evidence that defendant specifically intended to kill or to inflict great bodily harm upon Howard Wilson and Mary Snyder during a consecutive course of conduct which resulted in the death of at least one person and that defendant had therefore committed first degree murder as defined by La. R.S. 14:30(A)(4). *State v. Bourque*, 622 So.2d 198, 243 (La.1993); *State v. Johnson*, 541 So.2d 818, 826 (La.1989); *State v. Williams*, 480 So.2d 721, 726 (La.1985). *A fortiorari*, that evidence also supported the jury's finding of the aggravating circumstance in Article 905.4(A)(4) at the penalty phase of trial.

7. When the State excused Greg Scott, defense counsel stated, "I just need to note Mr. Scott is African American. I'd note that for the record. I'm not asking for anything." Rec. vol. 4, p. 831. Later, the State excused Thomas Hawkins, Jr. and defense counsel stated, "Note for the record that Mr. Hawkins is a black juror." Rec. vol. 4, p. 901. The prosecutor responded by asking, "Are you making a challenge that you want me to make—." Rec. vol. 4, p. 901. Defense counsel Vasquez then interjected, stating, "She didn't object." Rec. vol. 4, p. 901. No further discussion of these two jurors occurred.

en by the State).[8] Nevertheless, while defense counsel's choice not to object on *Batson* grounds until they felt a pattern of discrimination had emerged may have been a valid reason for delaying a request for a race-neutral explanation, it does not negate the fact that the State was never requested to provide a race-neutral explanation for its use of peremptory challenges on potential jurors Greg Scott and Thomas Hawkins, Jr. Even after lodging a *Batson* objection and requesting a race-neutral explanation for the State's challenge of other African-Americans, defense counsel never demanded such an explanation for these two jurors.

This court has traditionally applied La. C.Cr.P. art. 841 to errors occurring during voir dire.[9] It has consistently held that a defendant waives review of irregularities in the selection of the jury when an objection is not timely raised. *See State v. Potter*, 591 So.2d 1166, 1168 (La.1991) (failure to make *Batson* objection waived issue on appeal); *State v. Spencer*, 446 So.2d 1197, 1200 (La.1984) (review of improper exclusion of blacks from jury not preserved for appeal); *State v. Whitt*, 404 So.2d 254 (La.1981) (objection to failure to sequester jury at an earlier time waived); *State v. Bazile*, 386 So.2d 349 (La.1980) (improper procedure for selecting venire not reviewable where objection was made after jury was sworn); *State v. Qualls*, 377 So.2d 293, 298 (La.1979) (objection to State's use of peremptory challenges raised for first time on appeal came too late); *State v. Landry*, 262 La. 32, 262 So.2d 360 (1972) (issue waived where objection to three jurors improperly excluded for opposition to death penalty not timely made). With respect to prospective jurors Greg Scott and Thomas Hawkins, Jr., the defense failed to initiate the three-step *Batson* procedure properly and therefore the State did not offer race-neutral reasons for its challenges. Consequently, the trial court did not have the opportunity to rule on them. Defendant therefore waived any claim based upon the prosecutor's allegedly intentional discrimination against Greg Scott and Thomas Hawkins, Jr. and the issue is not properly before this court. *Potter*, 591 So.2d at 1168.

[6] Defense counsel did, however, lodge the proper *Batson* objections to the State's use of peremptory challenges against potential jurors Jeffrey Brooks, Elaine Scott and Loretta Walker. The State originally accepted Brooks as a juror, but later backstruck him. The prosecutor's reasons for striking Brooks were that he appeared "very nervous" throughout questioning and that he would be missing class, as a student teacher, if chosen to serve on the jury. The prosecutor stated, "He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase." Rec. vol. 4, p. 954. Defense counsel responded by stating:

> His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school and whoever it was and the Dean said that wouldn't be a problem. He was told that this would go through the weekend, and he expressed that that was his only concern, that he didn't have any other problems.
>
> As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous.

Rec. vol. 4, p. 955. The court allowed the State to exercise a peremptory challenge on Brooks.[10]

8. Defendant also claims in his brief that his trial attorneys rendered ineffective assistance of counsel in failing to lodge a *Batson* objection to the State's use of peremptory challenges against Greg Scott and Thomas Hawkins, Jr. This contention will be addressed later in this opinion.

9. La.C.Cr.P. art. 841 provides in pertinent part that "[a]n irregularity or error cannot be availed of after the verdict unless it was objected to at the time of occurrence."

10. After the trial court allowed the challenge, defense counsel stated for the record:

With respect to prospective juror Elaine Scott, the district attorney excused her, stating, "I observed she was very weak on her ability to consider the imposition of the death penalty. Her words, exactly—I wrote it down, that she thinks she could, and that's the reason for our challenge." Rec. vol. 4, p. 902. However, when asked again by the prosecution if she could impose the death penalty, she responded, "I could." Rec. vol. 4, p. 860. She also responded affirmatively when asked if she could listen to the evidence and consider whether to accept or reject the insanity defense and hold the defense to its burden of proof. Rec. vol. 4, p. 865–866. Nevertheless, the trial court accepted the State's explanation as race neutral and excused Elaine Scott.

The defense also lodged a *Batson* challenge when Loretta Walker was excused by the State. During voir dire Walker stated that she could not impose the death penalty based on her religious beliefs. Rec. vol. 4, p. 909. After further questioning, she did admit that under certain circumstances, for example if an innocent child was murdered, she could consider the death penalty. Rec. vol. 4, p. 921. Even though she was somewhat rehabilitated by the prosecutor, he excused her, stating, "The reason is very obvious that at first she said she could not do the death penalty for a long-standing, and then she said under a limited circumstance if he killed a child, she could do it. We don't have any evidence that this man killed a child, so." Rec. vol. 4, p. 958. The court allowed the State's challenge of Walker.

[7, 8] [10]The trial court entertained the State's race neutral reasons for the exclusions without making a finding as to whether defendant had made a prima facie showing of purposeful racial discrimination. A trial court's "demand that a prosecutor justify his use of peremptory strikes is tantamount to a finding that the defense has produced enough evidence to support an inference of discriminatory purpose." *State v. Green*, 94–0887, p. 25 (La.5/22/95), 655 So.2d 272, 288. Nevertheless, the issue of whether the defense established a prima facie case of discrimination is moot once the prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination. *Id.* (applying *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)). Nonetheless, any response will qualify as race neutral "unless a discriminatory intent is inherent in the prosecutor's explanation." *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

Here, the trial court did not find that defendant had established purposeful discrimination and overruled the *Batson* objections. These rulings appear correct. Although not required by the caselaw, the State's proffered reasons were plausible, supported by the record and race-neutral. *See, e.g., State v. Johnson*, 621 So.2d 1167 (La.App. 2 Cir.1993) (veniremen appeared inattentive and unresponsive or failed to maintain eye contact); *State v. McNeil*, 613 So.2d 752 (La.App. 4 Cir.1993) (same); *State v. Young*, 613 So.2d 631 (La.App. 1 Cir.1992) (same); *State v. Manuel*, 517 So.2d 374 (La.App. 5 Cir.1987) (same); *State v. Outley*, 629 So.2d 1243 (La.App. 2 Cir.1993) (veniremen young, inattentive, or knew defense counsel); *State v. Griffin*, 618 So.2d 680 (La.App. 2 Cir.1993) (veniremen all smiles and giggles during voir dire on the death penalty). *See also United States v. Cure*, 996 F.2d 1136 (11th Cir. 1993) (venireman inattentive); *cf. Hernandez*, 500 U.S. at 357, 111 S.Ct. at 1868 (State response will qualify as race neutral "unless a discriminatory intent is inherent in the prosecutor's explanation"). The prosecutor's reasons constituted "legiti-

> Your Honor, Mr. Brooks was the first African American chosen. The State subsequently proceeded to cut, at this point, it's either three or four and the record will reflect which it is, and the State has now gone back and cut the only African American that they chose. So that that [sic] needs to be on the record.
>
> Rec. vol. 4, p. 956.

mate" grounds for the exercise of a peremptory strike. *Purkett v. Elem*, 115 S.Ct. at 1771 ("What [*Batson*] means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection."). None of the reasons articulated by the State are readily associated with the suspect class that is alleged to be the object of the State's discriminatory use of peremptory challenges. Defendant, the opponent of the strikes, offered no facts or circumstances supporting an inference that the State exercised its strikes in a racially discriminatory manner. Therefore, the defendant's proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent. *See State v. Green*, 94-0887 at p. 27, 655 So.2d at 289.

After carefully reviewing the entire record of voir dire, we find no abuse of discretion or error by the trial court in its denial of defendant's *Batson* claims. The trial court heard the prospective jurors and concluded there were reasonable bases for the challenges in question. The record does not show that the State employed a tactic of purposeful discrimination in its exercise of peremptory challenges.

[9] Defendant also argues that his attorneys were ineffective for failing to object to the prosecution's improper use of its peremptory challenges to exclude African Americans from the jury. Specifically, defendant points to counsel's failure to raise a *Batson* objection to the State's use of peremptory challenges on veniremen Greg Scott and Thomas Hawkins, Jr. Defendant maintains that his trial counsel erroneously believed that the presence of one African American juror, Jeffrey Brooks (who was later backstricken by the State) defeated any *Batson* claim. Defendant contends that this error prejudiced him because it allowed the prosecutor to exercise peremptory challenges to remove members of the defendant's race from the jury venire for a discriminatory purpose without having to provide a race-neutral reason.

Even assuming defense counsel erred in failing to make a *Batson* objection to the State's challenges of Greg Scott and Thomas Hawkins, Jr., this failure does not prejudice the defendant to the extent that the trial was rendered unfair and the verdict suspect. In *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986), the United States Supreme Court held that *Batson* would not be applied retroactively on collateral review. The Court noted that retroactive effect is "appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." *Allen*, 478 U.S. at 259, 106 S.Ct. at 2880. The Court found, however, that although "the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial[,] ... the decision serves other values as well ... only the first of which may have some impact on truthfinding." *Id.* Because protections afforded by *Batson* did not go "to the heart of the truthfinding function," *Id.*, the Court held that *Batson* would not apply retroactively.

[10] While the instant case does not deal with the question of retroactivity, the Court's comments on the import of *Batson* are pertinent to the considerations present in the prejudice prong of the *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), two-part test used in ineffective assistance of counsel claims. Where a rule does not have "such a fundamental impact on the integrity of factfinding," *Allen*, 478 U.S. at 259, 106 S.Ct. at 2881, it cannot be said that the violation of such rule renders the trial unfair and the verdict suspect.[11]

11. As the *Allen* Court noted, the impact of the *Batson* rule is lessened because of the presence of other procedures that protect a defendant's interest in a neutral factfinder:

> Voir dire examination is designed to identify veniremen who are biased so that those persons may be excused through challenges for cause. Moreover, the jury charge typically includes instructions emphasizing that the jurors must not rest their decision on any impermissible factor, such as passion or prejudice.

Allen, 478 U.S. at 259 n. 2, 106 S.Ct. at 2881 n. 2. These other mechanisms existed prior to

Thus, counsel's failure to make a *Batson* objection did not prejudice defendant. Accordingly, this argument lacks merit.

Photographs

Defendant next argues that the trial court erred in overruling defense objections to the admissibility of certain State exhibits. Specifically, defendant complains of the introduction into evidence of three autopsy photographs of the non-fatal wound to Howard Wilson's left cheek.[12] Outside the presence of the jury, defense counsel stated the grounds for objecting to the photographs as follows:

> It's a wound from the ear to the mouth, and it was described as a hole in the decedent's face. The deputy testified that you could see into the hole and see the victim's tongue and his teeth. Those photographs show exactly that, and I don't think that the jury needs to see those photographs. Dr. Garcia, very fairly in her report, described this wound as nonfatal and in parenthesis, she let's [sic] us know how dramatic it is. She calls it "dramatic-appearing", and I think that that is a clue as to how prejudicial these photographs could be. It was—She clearly described this wound as nonfatal, and she clearly warned us that it was very dramatic-looking.
>
> There is no purpose. It doesn't establish cause of death. It doesn't show the jury anything other than how very gruesome this crime was. That has nothing to do with the very intellectual decision they have to make as to what kind of a murder it was. And this doesn't even show that it was a murder. This man would have fully recovered from this injury to his face, and I don't think that the jury needs to see what has already been testified to on the witness stand.

Rec. vol. 5, p. 1214.

[11–13] Contrary, however, to defendant's assertions here and the arguments of defense counsel during trial, the State is entitled to the moral force of its evidence. *State v. Robertson*, 97–0177, p. 29 (La.3/4/98), 712 So.2d 8, 32. Postmortem photographs of murder victims are admissible to prove corpus delicti and to corroborate other evidence establishing cause of death and location and placement of wounds, as well as to provide positive identification of the victim. *Robertson*, 97–0177 at p. 29, 712 So.2d at 32; *State v. Koon*, 96–1208 (La.5/20/97), 704 So.2d 756; *State v. Maxie*, 93–2158 (La.4/10/95), 653 So.2d 526; *State v. Martin*, 93–0285 (La.10/17/94), 645 So.2d 190. Photographic evidence will be admitted unless it is so gruesome that it overwhelms the jurors' reason and leads them to convict defendant without sufficient other evidence, *i.e.*, when the prejudicial effect of the photographs substantially outweighs their probative value. *Robertson*, 97–0177 at p. 29, 712 So.2d at 32; *State v. Perry*, 502 So.2d 543, 558 (La.1986), *cert. denied*, 484 U.S. 872, 108 S.Ct. 205, 98 L.Ed.2d 156 (1987).

[14] A review of the photographs complained of reveals that while the photographs of the wound to decedent's face are particularly graphic, they are relevant to illustrate the number and location of stab wounds to the victim. Additionally, the force necessary to inflict such a wound is also relevant to show defendant's specific intent to kill or to inflict great bodily harm. As such, the photographs' probative value outweighed any prejudicial effect. La. C.E. art. 403. The trial judge did not err in ruling that the photographs were admissible. Consequently, this portion of this assignment of error lacks merit.

the *Batson* decision, "creating a high probability that the individual jurors seated in a particular case were free from bias." *Allen*, 478 U.S. at 259, 106 S.Ct. at 2881.

12. Although defense counsel does not refer to the specific exhibit numbers, the pictures described in the brief relate to State's Exhibits Nos. 13, 14 and 15.

Defendant also complains of the admission of another series of photographs which depict him in a variety of martial arts poses. Some photographs depict defendant in a martial arts stance holding a knife-like weapon. Specifically, defendant contends that the photographs were erroneously admitted into evidence because they were remote in time, irrelevant and were introduced solely to prejudice defendant and show defendant was a "bad guy." The State, on the other hand, contends that the photographs were particularly relevant considering the suddenness and savagery of the attacks, the fact that the weapon used was some kind of double-edged knife and defendant's statement that he was "not familiar with, ha, with knives in a way." The State argues the photographs were admissible not only to refute defendant's statement that he was not familiar with knives, but also to show his obvious skill in using them.

Louisiana C.E. art. 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." All relevant evidence is admissible, except as otherwise provided by law, and irrelevant evidence is not admissible. La. C.E. art. 402. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, or waste of time. La. C.E. art. 403. Additionally, any photographic evidence which illustrates any fact, sheds light upon any issue in the case, or reliably describes a person, place or thing involved in the case, is admissible subject to a La. C.E. art. 403 balancing test. *State v. Lindsey*, 404 So.2d 466 (La.1981).

In the instant case, the determination of whether the photographs at issue are relevant to show the existence of any fact at trial is a close one. The prosecutor argued at trial that the photographs demonstrated defendant's martial arts training and disproved his assertion in his statement to the police that he had acted in self-defense during a struggle with the victim. The photographs, however, were taken more than ten years before trial, before defendant had even met his wife. The photographs were therefore remote in time. Moreover, the State's argument that the photos refute some vague assertion of self-defense made by defendant is also questionable because the fact that defendant had served in the military and had martial arts training did not automatically negate a claim of self-defense. On the other hand, the prosecution's argument that the pictures refuted defendant's statement that he was not familiar with knives has some merit.[13] The pictures showing defendant posed with the knife-like weapon clearly serve to rebut this statement. Additionally, as the State argues, the photographs can be viewed as evidence of defendant's specific intent to kill as they suggest he has experience and skill in the use of knives as weapons.

Although the photographs are arguably relevant even in light of the fact they were taken more than ten years before the crime occurred, their potential to prejudice the jury is certainly present. Considering the fact that defendant was charged with the brutal stabbing of his wife and her male companion, photographs depicting him in an "attack" position with what look like knives in his hands could give the jury a picture of him as a "bad man" and someone likely to commit such a crime. Thus, the probative value of the photographs was slight when compared to their tremendous potential to inflame the jury.

[15] However, although the trial court arguably erred by admitting the photographs, the error was harmless at the guilt

13. When asked to describe the knife he brought with him when he was looking for his wife, defendant told police:

> Well it was a brown and blue handle. It's a steak knife I believe . . . . I'm not familiar with, ha, with knives in a way.

Transcribed Audio Statement, p. 6.

phase. To determine whether an error is harmless, the proper analysis is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *State v. Bourque*, 622 So.2d 198, 241 n. 20 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)) (emphasis in original). In the instant case, the jury heard the testimony of the surviving victim and an eyewitness who described in detail defendant's brutal stabbing of the victim. Additionally, the jury also had access to defendant's inculpatory statements in which he confessed to the crime. In light of the overwhelming evidence against defendant, the erroneous admission of the photographs was unimportant in relation to the entire body of evidence presented at the guilt phase. Accordingly, the jury's rejection of defendant's proffered defenses was "surely unattributable to the error." *Id.* Thus, the trial court's admission of the photographs, even if in error, was harmless at the guilt phase and this portion of the assignment of error lacks merit.

[16, 17] Likewise, the admission of the photographs at the penalty phase was also harmless. An error committed in the penalty phase is harmless if the sentence actually rendered in this trial was surely unattributable to the error.[14] *State v. Bourque*, 622 So.2d at 241 n. 20. At the penalty phase, the complained of photographs paled in comparison to the violence of the crime already described in detail to the jurors and the overwhelming testimony of the various instances of domestic abuse Mary Snyder suffered at the hands of defendant. Testimony revealed that defendant had hit his wife with a baseball bat, threatened to hit her with a hammer, slammed her head into a bedroom wall, smashed her head against a windshield and stabbed her with a screwdriver. The photographs of defendant obviously posing for the camera with knife-like objects did not add any arbitrary factor into the jury's deliberations in light of this testimony. Thus, in this particular case, we conclude there is not a reasonable possibility that the introduction of the photographs at the penalty phase contributed to the sentence and their admission was harmless beyond a reasonable doubt. Consequently, this portion of this assignment of error is without merit.

Prosecutor's Argument

[18] Defendant contends it was reversible error for the prosecutor to refer to the O.J. Simpson case during his closing argument in the penalty phase. Defendant points to the following exchange which occurred during the State's rebuttal argument:

State: Mr. Vasquez [defense counsel] tried to describe this man as being the man who—And it was 12 hours later when he called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of—

Defense: Your Honor, I object. I want to approach on this.

Court: Okay. Counsel, come forward.

(Whereupon, the following is taken at the bench, out of the hearing of the jury.)

Defense: He's going to mention the O.J. Simpson trial.

State: That case—

Defense: I object to that.

14. In *Chapman* and *Sullivan*, the harmless error rule was applied to the jury's decision to convict rather than to its sentencing decision. Nevertheless, the harmless error analysis has subsequently been used in reviewing the alleged prejudicial impact of errors in the penalty phase of capital trials. *See State v. Lee*, 524 So.2d 1176, 1192 n. 4 (La.1987) (on rehearing).

State: Your Honor, based upon what he did in this case, where he sat for about 12 hours, he huddled and pretended to kill himself, just like O.J. did and just like O.J. got away it [sic]. I think that's fair—

Defense: That's ridiculous.

State: It's a fair comment and those people will decide what weight they want to give to it.

Defense: Judge, that's—

State: That is as ridiculous as some of the things you said, and I think that's fair comment on something that's common knowledge. And certainly, those people are intelligent enough to give it whatever weight they want to.

Court: I'm going to allow it.

Defense: Note our objection. Please note our objection.

(Whereupon, the following is taken in the hearing of the jury.)

State: The most famous murder case, and all of you all have heard about it, happened in California very, very, very similar to this case. The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that's not what that man was thinking about when he called in and claimed that he was going to kill himself?

Rec. vol. 7, p. 1591. Specifically, defendant alleges the comments by the prosecutor were so prejudicial that they influenced the jury and contributed to their decision to impose the death penalty. Defendant claims that "it has been proved by countless polls that the majority of white Americans believe that O.J. Simpson was guilty of murdering his wife and, by virtue of the not guilty verdict returned in him criminal case, that he 'got away with murder.'" Br. at 27. Consequently, the defense argues, because the defendant is African-American and the jury was all white, the effects of the prosecutor's comments were devastating.

[19, 20] Louisiana C.Cr.P. art. 774 provides that the scope of argument "shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." Article 774 further provides that the argument "shall not appeal to prejudice." Nevertheless, a prosecutor retains "considerable latitude" when making closing arguments. *State v. Taylor*, 93-2201 p. 19 (La.2/28/96), 669 So.2d 364, 374. A conviction or sentence will not be reversed for improper closing argument unless this court is thoroughly convinced the remarks influenced the jury and contributed to the verdict. *Taylor*, 93-2201 at p. 21, 669 So.2d at 375; *State v. Kyles*, 513 So.2d 265, 275 (La.1987); *State v. Knighton*, 436 So.2d 1141, 1152 (La.1983). Even where the prosecutor's statements are improper, credit should be accorded to the good sense and fairmindedness of the jurors who have heard the evidence. *Kyles*, 513 So.2d at 276; *State v. Jarman*, 445 So.2d 1184, 1187 (La.1984).

In the instant case, even assuming the prosecutor's statements regarding the O.J. Simpson case were improper, it cannot be said they created a substantial risk that the death penalty would be imposed under the influence of passion, prejudice or arbitrary factors. Thus, in light of the deference given to the good sense and fairmindedness of jurors and after reviewing the comments as a whole, we are not firmly convinced that they influenced the jury or contributed to the verdict. This portion of the assignment of error is without merit.

Assignments of Error Nos. 3 and 4

In these assignments of error, defendant argues that the trial court erred in failing to continue the trial to allow defense counsel adequate time to prepare and to develop a defense of insanity. Specifically, defendant argues that the trial court's denial of a continuance to allow his anti-depressant medication enough time to remedy his

unfocused, tangential and circumstantial ideation rendered him unable to effectively communicate with his attorney and therefore unable to assist his counsel. According to the defense, defendant's mental instability at the time of trial, which included difficulties in focusing on questions and in answering them in a coherent manner, caused him to be incapable of testifying in his own defense. Br. at 15.

Prior to the trial, defendant filed a motion to appoint a sanity commission in which it was alleged that defendant had been diagnosed with a depressive disorder since his incarceration and was under the care of the Jefferson Parish Prison psychiatrist, Dr. Richard Richoux. Furthermore, the motion stated that defendant's counsel had noted what she believed "may be a deterioration in defendant's mental capabilities, particularly in relation to his ability to assist in his defense." Specifically, defendant's attorney noted that defendant "appears to counsel to be severely depressed, and has been increasingly unfocused, scattered, and poorly communitative [sic] in interviews. Defendant is unable to answer even simple questions regarding the facts of his case." Rec. vol. 1, p. 144. This motion was granted on July 29, 1996.

On August 1, 1996, defendant was examined for his competency to stand trial by Dr. Debra DePrato, a forensic psychiatrist, and Dr. Barbara McDermott, a clinical psychologist. A sanity hearing was held on August 8, 1996, in which Dr. DePrato testified that in her opinion, defendant "is able to assist in his own defense as well as understand the proceedings against him." Rec. vol. 2, p. 372. However, Dr. DePrato testified that defendant had some difficulty focusing on certain issues and became mildly circumstantial and tangential. Because of these difficulties, Dr. DePrato reiterated the recommendation contained in her report that defendant's medication prescribed for the treatment of depression be changed from Sinequan to Prozac or Zoloft. She testified this change in medication was necessitated by the fact that defendant could only tolerate very low dosages of Sinequan, which did not totally alleviate defendant's symptoms, before bothersome side effects occurred. Regarding this change in medication, Dr. DePrato testified as follows on cross-examination by defendant's attorney:

> Q. [I]s it your opinion that he needs to have his medication changed because the side effects are making it impossible to up his dosage?
>
> A. Well, there's really two reasons, if I can explain.
>
> Q. Sure.
>
> A. Dr. Richoux has felt that Mr. Snyder was depressed since his incarceration. He's been on Sinequan, off and on, and hasn't been able to take it at times because of the side effects of that medication. So that he hasn't been on it consistently enough, I think for it to help, as well as, if his dosage was increased, it may have helped more. But because of urinary retention, constipation, those kind of side effects, the dosage hasn't been able to be increased. So it's really a combination of things. So that I don't really know that it's been very effective at all, because he hasn't been on it as consistently as he should have been also.
>
> Q. If he were placed on medication which did not cause these side effects so that he could be placed on a proper dosage, how long do you think it would be before the symptoms were alleviated to the point where he could possibly—where the symptoms—where he could possibly focus more?
>
> A. Typically, a medication like I'm recommending, Prozac or Zoloft doesn't interfere with urinary retention problems. So he shouldn't have any problems with that. You can see benefits from one to two weeks in attention and concentration, but full benefits are about six weeks later. So some people begin to respond immediately while the full maximum potential can take about six weeks.
>
> Q. Okay. And you have made that recommendation, and you have asked that a

copy of your report be sent to Dr. Richoux?

A. Yes. I feel the jail would benefit from a copy so we would—they would know our recommendations regarding that since they were concerned about his issue of competency as well.

If I could add one thing about the symptoms, I forgot—

Q. Sure.

A. —to mention. One of the symptoms Mr. Snyder complained about that is probably a side effect of this medication was kind of light-headedness or feeling cloudy headed which is a common side effect of Sinequan. So if stopped that, that would stop immediately.

Q. Okay.

A. Or get better.

Q. Could I ask you just briefly about your conclusions—you indicate the [sic] he occasionally has difficulty focusing on questions asked of him, and becomes mildly circumstantial and tangential. That's what you were describing a few questions ago?

A. Tangential means getting off the subject, and circumstantial means giving a lot of over-detailed information without really giving the information you need.

Q. Okay. And Doctor, is it your opinion that a change in medication could alleviate both symptoms that make it difficult to communicate with him?

A. Yes. It could improve those.

Rec. vol. 2, p. 374. Following the testimony of Dr. DePrato, both parties stipulated that if Dr. McDermott, the psychologist who examined defendant along with Dr. DePrato, were called to testify, her testimony would essentially be the same as that of Dr. DePrato. Rec. vol. 2, p. 376.

At the conclusion of the sanity hearing, the trial court found defendant competent to stand trial, stating only, "The Court finds that Mr. Snyder is able to understand the proceedings against him, and is able to assist in his defense. And therefore, is competent to stand trial." Rec. vol. 2, p. 377.

On August 16, 1996, defendant's medication was changed from Sinequan to Prozac by defendant's attending psychiatrist at the Jefferson Parish Correctional Center. Defense counsel then moved for a five-week continuance so that defendant could receive the full benefit of the new medication which would allow his mental state to improve to the point where he could fully assist his counsel. A hearing on this motion was held on August 20, 1996. At this hearing, defense counsel introduced and filed into the record a letter from Dr. Richoux, defendant's attending psychiatrist, to the trial judge which states that effective August 16, 1996, defendant's antidepressant medication had been changed to Prozac and that it would take approximately six weeks for defendant to attain the maximum therapeutic benefits of the new drug. Dr. Richoux informed the court that the change in medication was necessary because "Mr. Snyder continues to display severe depressive symptoms that may interfere with his ability to assist his attorney...." Although defendant's counsel stated at this hearing that defendant was "technically" competent, her argument was directed at defendant's alleged inability to assist in his own defense. Rec. vol. 2, p. 411. Defense counsel told the court she was requesting a five-week continuance so that defendant could receive the full benefit of the new medication which would allow him to have "every bit of my assistance, which I cannot render adequately at this time." Rec. vol. 2, p. 408.

Although the trial court noted that Dr. Richoux's report stated that defendant's symptoms may interfere with his ability to assist his attorney, rec. vol. 2, p. 410, defendant's request for a continuance was denied. In denying the request, the court stated only, "Well, based on Dr. Deprado's [sic] testimony and in her report that he is—that the symptoms do not interfere with his ability to understand the proceed-

ings against him or to assist in his defense, I'm going to go ahead and deny the motion." Rec. vol. 2, p. 412.

On August 22, 1996, defendant was given a psychological evaluation by Dr. Elaine Salzer, a clinical psychologist. Although she was not called to testify at trial because she was out of town at the time, her report was proffered by the defense. Dr. Salzer's report notes that defendant had been on Prozac for about one week prior to her examination and, at the time of the examination, had not had sufficient time to stabilize on this medication. Dr. Salzer's report also observes that once defendant's condition stabilizes on the medication, it is reasonable to assume that his cognitive processes should become sharper and more focused.

On August 27, 1996, a motion for *in camera* testimony by the defense attorney regarding defendant's ability to assist counsel was filed and heard. In this motion, defense counsel asked that she be allowed to present *in camera* testimony detailing the difficulties she experienced in communicating with defendant which rendered him unable to assist in his defense and therefore rendered her assistance ineffective. Defendant's attorney sought to give this testimony *in camera*, out of the presence of the Assistant District Attorney, because of the confidential nature of the attorney-client communications at issue. The trial court summarily denied the motion for *in camera* testimony, but allowed defense counsel to testify in open court as to her concerns regarding matters of a non-confidential nature. Defendant's attorney testified that her representation of Mr. Snyder had been compromised by his state of mind, due to the fact that he had been severely depressed and inadequately treated. Rec. vol. 2, p. 474.

[21, 22] As a general matter, the decision to grant or deny a motion for continuance rests within the sound discretion of the trial judge, and a reviewing court will not disturb a trial court's determination absent a clear abuse of discretion. La. C.Cr.P. art. 712; *State v. Strickland*, 94-0025, p. 23 (La.11/1/96), 683 So.2d 218, 229; *State v. Bourque*, 622 So.2d 198, 224 (La. 1993), *overruled on other grounds by State v. Comeaux*, 93-2729 (La.7/1/97), 699 So.2d 16. Whether a refusal to grant a continuance was justified depends on the circumstances of the particular case presented. *State v. Bourque*, 622 So.2d at 224; *State v. Simpson*, 403 So.2d 1214, 1216 (La. 1981). Generally, this court declines to reverse convictions for improper denial of a motion to continue absent a showing of specific prejudice. *State v. Strickland*, 94-0025 at p. 23, 683 So.2d at 229; *State v. Gaskin*, 412 So.2d 1007, 1011 (La.1982).

[23-26] Limits on the court's discretion to grant or deny a continuance, however, are imposed by defendant's constitutional rights, including his rights to understand the proceedings against him, to assist in his defense, and to the assistance of counsel. *See United States v. Soldevila-Lopez*, 17 F.3d 480, 487 (1st Cir.1994). If a defendant lacks the ability to communicate effectively with counsel, he may be unable to exercise other rights deemed essential to a fair trial. *Cooper v. Oklahoma*, 517 U.S. 348, 364, 116 S.Ct. 1373, 1381, 134 L.Ed.2d 498 (1996). Constitutional due process requires that the trial of an accused be conducted only when he is legally competent. *Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956); *State v. Nomey*, 613 So.2d 157 (La.1993). The test for determining defendant's mental competency depends upon "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 403, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). Defendant's allegations that he was unable to communicate with his attorney thus raise serious constitutional issues. Because the record reflects that the trial court failed to make further inquiry into defendant's claims that he needed to be stabilized on his new medication in order to effectively

communicate with his counsel and assist in his defense when such claims, combined with objective medical evidence, raised a sufficient doubt as to defendant's competence, we must question whether defendant received a fair trial in this regard.

In *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), the Court reversed petitioner's conviction because the record before it revealed that the lower courts failed to give proper weight to information suggesting petitioner's incompetence that came to light during trial. The Court found that the failure to make further inquiry into petitioner's competence to stand trial denied him a fair trial. In reaching its conclusion, the Court stated:

> The sentencing judge and the Missouri Court of Appeals concluded that the psychiatric evaluation of petitioner attached to his pretrial motion for a continuance did not contain sufficient indicia of incompetence to stand trial to require further inquiry. Both courts mentioned aspects of the report suggesting competence, such as the impressions that petitioner did not have 'any delusions, illusions, hallucinations . . .,' was 'well oriented in all spheres,' and 'was able, without trouble, to answer questions testing judgment,' but neither court mentioned the contrary data. The report also showed that petitioner, although cooperative in the examination, 'had difficulty in participating well,' 'had a difficult time relating,' and that he 'was markedly circumstantial and irrelevant in his speech.' In addition, neither court felt that petitioner's episodic irrational acts described in the report or the psychiatrist's diagnoses of '(b)orderline mental deficiency' and '(c)hronic (a)nxiety reaction with depression' created a sufficient doubt of competence to require further inquiry.

Id. at 175, 95 S.Ct. at 905.

The Court noted that it did not appear the examining psychiatrist was asked to specifically consider the issue of petitioner's competence to stand trial and, like the report itself, the petitioner's "somewhat inartfully drawn motion for a continuance" did not clearly suggest that petitioner's competence to stand trial was the question sought to be resolved. However, it found the sentencing judge erred in concluding that counsel's pretrial contention that "the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial" did not raise the issue of petitioner's competence to stand trial. Finally, the Court concluded that at the stage at which the pretrial motion for continuance was filed, "it would have been, at the very least, the better practice to order an immediate examination under [Missouri law]." *Id.* at 177, 95 S.Ct. at 906.

Similarly, in *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), the Court held that the failure to observe procedures adequate to protect a defendant's right not to be tried while incompetent deprives him of his due process right to a fair trial. There, the Court expressed doubt as to whether a defendant can waive the defense of his competence to stand trial, stating, "But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* at 384, 86 S.Ct. at 841. The Court also noted that even when a defendant does not explicitly state that competence to stand trial is at issue, trial judges must consider the question of competency where the evidence presented raises a doubt as to defendant's competence. *Id.* at 384 n. 6, 86 S.Ct. at 841 n. 6.

[27, 28] Thus, if there is a sufficient doubt as to the mental competency of an accused, the trial court has a responsibility to order a hearing *sua sponte*. *Griffin v. Lockhart*, 935 F.2d 926 (8th Cir.1991). The *Pate* procedural guarantee is violated when, in light of what was then known to the trial court, the failure to make further inquiry into defendant's competence to stand trial denied him a fair trial. *Lokos*

v. Capps, 625 F.2d 1258, 1261 (5th Cir.1980) (citing *Drope*, 420 U.S. at 174, 95 S.Ct. at 905). The relevant question is: "Did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about defendant's competency and alerted him to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos*, 625 F.2d at 1261.

Although defendant's counsel stated in the hearing on the motion to continue that defendant was "technically" competent, her arguments raised the issue of whether defendant could communicate with her well enough to allow her to effectively assist him. A comprehensive reading of her arguments regarding defendant's inability to communicate leads us to believe that defense counsel's statements which seemingly concede defendant's competence actually referred to that prong of competence relating to defendant's capacity to understand the proceedings against him. Obviously, her complaints of difficulty in communicating with defendant which hindered her ability to assist him and her references to Dr. Richoux's letter which stated that defendant's depressive symptoms may interfere with his ability to assist his attorney relate to defendant's ability to assist in his defense. These complaints, coupled with the medical evidence presented, while not necessarily dispositive of the competency issue, were nevertheless sufficient to warrant the trial court's attention. Its failure to further inquire into defense allegations that defendant was experiencing difficulties in communicating with his attorney was therefore error.

[29] At the time defendant's motion to continue the trial was heard, the trial court had before it the report and testimony of a psychiatrist and a clinical psychologist which opined that defendant was competent to stand trial, but had difficulty focusing on questions asked of him and became mildly circumstantial and tangential and consequently would benefit from a change in medication to control his depressive disorder. Additionally, testimony revealed that once this change in medication occurred, it would take six weeks for defendant to receive the maximum benefits of the new drug. Moreover, the trial court had before it a letter from defendant's attending psychiatrist stating that defendant's medication had been changed because of defendant's display of severe depressive symptoms "that may interfere with his ability to assist his attorney" and that it would take approximately six weeks for defendant to attain the maximum therapeutic benefits of the new medication. The trial court was also aware of defense counsel's allegations that defendant's thinking was attenuated and he needed to be stabilized on the new medication before he could adequately assist in his defense. This evidence, centering on defendant's difficulties in communicating and alleged inability to assist counsel, should have raised a question of defendant's competence in the judge's mind. As was noted in *Cooper v. Oklahoma*, 517 U.S. 348, 354 n. 4, 116 S.Ct. 1373, 1377 n. 4, 134 L.Ed.2d 498 (1996), "Indeed the right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination." *See also* La.C.Cr.P. art. 642.[15] This is nevertheless true even in the face of defense counsel's statements that she was not asking for the continuance on the ground of defendant's incompetence, for, as noted above, her arguments were actually directed to his competence and it is doubtful that defendant can waive his due

15. La.C.Cr.P. art. 642 provides:
> The defendant's mental incapacity to proceed may be raised at any time by the defense, the district attorney, *or the court*. When the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed.
(Emphasis added.)

process right not to stand trial while incompetent.

With all of the evidence before it that at least raised some question as to defendant's competency, particularly as to his ability to assist counsel before he was fully stabilized on new medication, the trial court failed to make any investigation into the validity of these concerns. The trial judge did not, for example, interview defendant on the record nor did he ask defense counsel to elaborate on the problems defendant was experiencing. In fact, when defense counsel asked to give the court specific examples of the difficulties she was encountering, she was summarily denied the opportunity to do so. It is not that we believe defendant was in fact unable to assist his attorney or that he was otherwise incompetent. Rather, it is the trial court's absolute failure to investigate these claims, which were substantiated by objective medical evidence, that causes us to determine he abused his discretion in failing to investigate defense claims of incompetence.

[30] Although Drs. DePrato and McDermott concluded that defendant was able to understand the proceedings against him and was able to assist in his own defense at the time of their evaluation of him, the trial court could not base its decision regarding defendant's competency solely on the conclusions of these doctors, especially in light of the medical evidence presented after the evaluation was completed. As we noted in *State v. Bennett*, 345 So.2d 1129, 1137 (La.1977) (on rehearing), "[T]he trial court may not rely so extensively upon medical testimony as to commit the ultimate decision of competency to the physician." The facts to consider in determining a defendant's ability to assist in his defense include: whether he is able to recall and relate facts pertaining to his actions and whereabouts at certain times; whether he is able to assist counsel in locating and examining relevant witnesses; whether he is able to maintain a consistent defense; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements; whether he has the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he is capable of testifying in his own defense; and to what extent, if any, his mental condition is apt to deteriorate under the stress of trial. *Bennett*, 345 So.2d at 1138. The record contains no evidence that the trial court considered any of these fa. ors when the question of defendant's ability to assist in his own defense was raised.

Had the record in this case contained some affirmative evidence that the trial judge conducted any investigation into defense allegations that defendant could not assist his counsel, our result may have been different. For example, in *United States v. Lopez*, 71 F.3d 954 (1st Cir.1995), *abrogated on other grounds by United States v. Wells*, 519 U.S. 482, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997), defendant learned he had a small brain lesion or tumor about two weeks into his trial. After a recess, a hearing was held to consider defendant's motions for a mistrial based on lack of competency or for a continuance for purposes of treatment. The court observed that defendant was not claiming that he was incompetent; instead, he argued that the trial court's failure to halt the proceedings so that defendant could have surgery violated his constitutional rights by imposing a regime of medication that so impaired his abilities that he was unable to testify coherently on his own behalf. The basis of defendant's arguments was that medications prescribed for his condition caused side effects, such as grogginess, that interfered with his ability to proceed and his attorneys stated that defendant had problems communicating with them and was not able to cooperate fully. Following several examinations by doctors and its own observations, the trial court denied the motion and the trial continued, with defendant testifying in his own defense. The court of appeals, citing the careful investigation of the trial court into

the matter, found no abuse of discretion, stating:

> Lopez' health obviously warranted an inquiry by the trial judge. Far from ignoring the issue, the trial court deferred trial for a substantial period, summoned medical experts one after another, took an active role in securing diagnoses for Lopez, had him re-examined repeatedly, and took testimony and made findings in abundance, including a detailed post-trial order summarizing the court's findings and reasons for proceeding with trial.
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> * * *
>
> Lopez' main trial counsel did protest at times that his client was not able to cooperate fully; but these complaints of Lopez' conduct during trial are balanced, if not outweighed, by the district court's findings that Lopez appeared to be well oriented and was cooperating with counsel.

Id. at 958.

Other courts have also affirmed a trial court's denial of a continuance in circumstances similar to the ones presented in *Lopez*, but in those cases the record clearly supported the trial court's decision. The defendant in *United States v. Moore*, 27 F.3d 969 (4th Cir.1994) requested a continuance, contending he was physically and psychologically unable to stand trial and psychologically unable to assist in his defense. After a hearing on the motion in which a letter from defendant's psychiatrist was produced which stated that defendant was suffering anxiety and depression that impaired his ability to assist in his defense, the court denied the motion. The appellate court declined to reverse the court's ruling, finding that sufficient evidence was presented to support the trial court's ruling. For example, defendant's counsel conceded that defendant had actively participated in readying his defense by contacting and interviewing witnesses, preparing documents and working closely with his attorneys. Additionally, the trial court observed on the record that defendant "did not appear to be in any acute distress and consulted with his counsel throughout the proceedings." *Moore*, 27 F.3d at 973. In *United States v. Nasim*, 932 F.2d 964 (4th Cir.1991) (unpublished per curiam), defendant moved for a continuance based on the unavailability of medications prescribed by his doctor. The trial court denied the motion. The court of appeals found no abuse of discretion in the denial because defense counsel advised the court that his client was able to communicate with him about the issues in the case and the trial court itself noted that defendant sounded "perfectly rational." Finally, in *Fisher v. State*, 736 P.2d 1003 (Okla. Crim.App.1987), defendant requested a continuance during his trial, contending he had taken two tablets of Mellaril to control his anxiety which he had "saved" from the jail and the medication made him feel intoxicated, drowsy and unable to think clearly. The trial court conducted an *in camera* hearing at which defendant's doctor testified that even if defendant had taken two tablets at the time he said he did, the effects of the medication would have worn off in six hours and two witnesses testified that defendant acted no differently on this day than on any other and did not appear to be under the influence of any drugs. The trial court denied the motion, stating that even if he had taken the medication, defendant's ability to think or to communicate had not been impaired. Defendant then took the stand and testified coherently in his own defense. The reviewing court held that, on the record before it, it could not find an abuse of discretion in the trial court's denial.

Unlike the records present in the cases discussed above, the record before us gives us no basis upon which to determine that the trial court did not err in failing to make further inquiry into defendant's competency. In contrast to the *Lopez* court, the trial court in this case did not undertake any investigation into the allegations made by defense counsel that defendant was having difficulties communicating with her. Such an investigation was warranted in light of the fact that Drs. DePrato, McDermott, Richoux and Salzer all believed that defendant's condition necessi-

tated the change in medication and that it would take approximately six weeks for the drug to reach its maximum effectiveness. There is no affirmative indication on the record by the judge, the district attorney or the defense attorneys that the defendant could, in fact, or did, in fact, assist his attorney. Furthermore, defendant did not testify in either phase of his trial, so we cannot review his testimony and determine whether he had any significant difficulties in communicating. Finally, when defendant's counsel offered to specify for the record the difficulties she was experiencing in attempting to represent defendant, she was prevented from doing so by the trial judge. For all of these reasons, we cannot say with certainty whether defendant received a fair trial. Consequently, the record before us does not permit us to find that the trial court did not err in failing to make further inquiry into defendant's competency.

[31] Having found that the trial court abused its discretion in failing to investigate defendant's claims of incompetency, we must now determine the proper remedy. In the instant situation, we believe a nunc pro tunc hearing to determine whether defendant was competent at the time of his trial is appropriate if a meaningful inquiry into defendant's competency can still be had.

In *State v. Nomey*, 613 So.2d 157 (La. 1993), defendant was allowed to plead guilty to first degree murder one day after the members of a sanity commission conducted their examinations. In a motion for post-conviction relief, defendant argued the trial court's failure to conduct a hearing on the issue of his sanity prior to accepting his guilty plea violated his due process rights. The trial court denied the request for post-conviction relief, but on appeal the court of appeal ordered the trial court to conduct an evidentiary hearing to determine defendant's capacity to proceed at the time of the entry of the plea. After the hearing, the trial court held defendant had the capacity to proceed when the plea was entered. The court of appeal affirmed this determination. This court held the court of appeal erred in remanding the case for a retroactive sanity hearing because the trial court's acceptance of the plea without first resolving the issue of defendant's competency violated defendant's due process rights. The court did, however, note the following:

> The present case is distinguishable from a case such as *State v. Bennett*, 345 So.2d 1129 (La.1977). In *Bennett*, the sanity hearing was held, but the examining physicians admitted that they could not be certain of their results without further clinical evaluation of defendant. The trial judge failed to order additional testing upon defendant's request. Defendant was thereafter found guilty as charged by a jury. On appeal, we remanded for another sanity hearing following a complete reexamination of the defendant. Unlike the present case, the defendant in *Bennett* did receive a hearing, at which the members of the sanity commission testified. Further, the defendant in *Bennett* alleged he suffered from mental retardation, which we found to be a more static condition than mental illness. Hence, under certain limited circumstances, a retroactive determination of sanity may be permissible. Likewise, we do not mean to foreclose the possibility of a nunc pro tunc competency hearing, if a meaningful inquiry into defendant's competence can still be had, in those cases where the trial judge ignores a bona fide doubt as to defendant's competence to stand trial, or the issue of competence is not raised at trial. *See Lokos v. Capps*, 625 F.2d 1258 (5th Cir.1980); *Zapata v. Estelle*, 588 F.2d 1017 (5th Cir.1979). Those cases are not applicable to the present case, however, since defendant *did* raise the issue of competence prior to trial and the trial judge agreed there was reasonable ground for a mental examination under La.Code Crim.P. art. 643.

Nomey, 613 So.2d at 162 n. 8. Thus, *Nomey* does not preclude the possibility of a nunc pro tunc competency hearing in a case such as the one *sub judice* where the

trial judge ignored a bona fide doubt as to defendant's competence to stand trial.

The federal courts of appeals, although noting that retrospective competency hearings are not favored, have allowed nunc pro tunc hearings on the issue of competency if a meaningful inquiry into the defendant's competency can still be had. *See, e.g., Reynolds v. Norris*, 86 F.3d 796 (8th Cir.1996); *Watts v. Singletary*, 87 F.3d 1282 (11th Cir.1996); *United States v. Renfroe*, 825 F.2d 763 (3rd Cir.1987); *Zapata v. Estelle*, 588 F.2d 1017 (5th Cir.1979). The trial court is [3] in the best position to determine whether it can make a retrospective determination of defendant's competency during his trial and sentencing. *Renfroe*, 825 F.2d at 767. The determination of whether a trial court can hold a meaningful retrospective competency hearing is necessarily decided on a case-by-case basis. *Miller v. Dugger*, 838 F.2d 1530 (11th Cir.1988). The State bears the burden to show the court that the tools of rational decision are available. *Lokos v. Capps*, 625 F.2d 1258 (5th Cir.1980).[16]

A "meaningful" determination is possible "where the state of the record, together with such additional evidence as may be relevant and available, permits an accurate assessment of the defendant's condition at the time of the original state proceedings." *Reynolds*, 86 F.3d at 802. Additionally, "[w]hen determining whether a meaningful hearing may be held, we look to the existence of contemporaneous medical evidence, the recollections of non-experts who had the opportunity to interact with the defendant during the relevant period, statements by the defendant in the trial transcript, and the existence of medical records. The passage of time is not an insurmountable obstacle if sufficient contemporaneous information is available." *Reynolds*, 86 F.3d at 803 (citations omitted). The court in *Miller v. Dugger*, 838 F.2d 1530 (11th Cir.1988) noted that it had never given the district courts a list of factors that must be met in order to determine that a nunc pro tunc determination of competency is possible, but stated that relevant factors include time, availability of witnesses and the existence of evidence on the state record about the defendant's mental state at the time.

Because we believe a nunc pro tunc competency hearing may be possible to rectify the trial court's error in failing to make further inquiry into defendant's competency prior to trial, we will remand the case to the trial court for the sole purpose of determining whether such a hearing is now possible and, if so, to conduct such an evidentiary hearing. Because of the sparse testimony before the trial court, we envision the taking of additional testimony and evidence, [3] including medical testimony relating to defendant's mental condition during that time prior to trial when he was allegedly unstabilized on his new medication and the records of examining physicians made during that time period, to allow the trial court to determine whether defendant was competent.[17] *See Renfroe*,

16. The State bears this burden because a nunc pro tunc competency hearing is essentially "a harmless error determination in disguise." *James v. Singletary*, 957 F.2d 1562, 1571, n. 14 (11th Cir.1992). The *James* court reached this conclusion because "*Pate*, in essence, established a rebuttable presumption of incompetency upon a showing by a habeas petitioner that the state trial court failed to hold a competency hearing on its own initiative despite information raising a bona fide doubt as to the petitioner's competency. According to *Pate*, the state could rebut this presumption by proving that the petitioner in fact had been competent at the time of trial." *Id.* at 1570 (footnote omitted).

17. We note that defendant was examined by Drs. Richoux, Deland and Salzer during this time period. Additionally, there is some implication in the record that Dr. Hannie examined defendant during this period. Rec. vol. 2, p. 472. There is no indication when defendant was examined by Dr. Davis, although his testimony and records would certainly be relevant if he also examined defendant at the time he was allegedly unstabilized on his medication. The testimony of doctors or mental health experts who conducted mental examinations close to the trial date increase the probability that the nunc pro tunc hearing will not be unduly speculative. *United States v. Makris*, 535 F.2d 899, 904 (5th Cir.1976). One reason we believe remanding this case to

825 F.2d at 767. If the trial court concludes defendant was competent, no new trial is required to be conducted. *United States v. Haywood*, 155 F.3d 674 (3rd Cir. 1998). If the trial court finds a meaningful inquiry cannot be had, or if it determines after the hearing that defendant was not competent at the time of his trial, defendant shall be entitled to a new trial.[18] *See United States v. Mason*, 52 F.3d 1286 (4th Cir.1995); *Zapata v. Estelle*, 588 F.2d 1017 (5th Cir.1979).

In a related assignment of error, defendant argues that the trial court erred in failing to grant a continuance to give defense counsel more time to prepare. According to the defense, counsel for defendant's penalty phase received his appointment to represent defendant on May 3, 1996, with a trial date on a charge of first degree murder set for August 27, 1996.[19] Prior to trial, defendant filed a second motion for continuance alleging that the penalty phase attorney would only have three and one-half months from the date of his appointment (and two months from the date the State announced it would seek the death penalty) in which to prepare defendant's penalty phase defense. The defense alleged that although it had undertaken "an aggressive effort to investigate the case for mitigation and to prepare its presentation" it needed an additional thirty days to adequately prepare. In a separate motion for continuance, the penalty phase attorney [illegible] again requested a continuance based on the fact that he had participated in another first degree murder trial beginning on July 22, 1996, and lasting ten days. As a result of the time spent preparing for and conducting that trial, defendant's counsel alleged he had less than four weeks to investigate and prepare defendant's mitigation case which included conducting interviews in defendant's hometown of Waterproof, Louisiana, three hours away from counsel's office. After the hearings on these motions, the trial court denied both without reasons.

[32] The denial of a motion for continuance on grounds of counsel's lack of preparedness does not warrant reversal unless counsel demonstrates specific prejudice resulting from the denial. *State v. Haarala*, 398 So.2d 1093, 1099 (La.1981). This specific prejudice requirement has been disregarded by this court in cases where the preparation time was so minimal as to call into question the basic fairness of the proceeding. *State v. Jones*, 395 So.2d 751 (La.1981); *State v. Durio*, 371 So.2d 1158 (La.1979). This court has also held that when preparation time is unreasonably short, counsel has been diligent, and there is a general allegation of prejudice, denial of a motion for a continuance is an abuse of discretion which constitutes reversible error. *Durio*, 371 So.2d at 1161; *State v. Winston*, 327 So.2d 380 (La.1976) (conviction for distribution of heroin reversed when defense counsel was given only three days in which to prepare for trial); *State v. Simpson*, 403 So.2d 1214 (La.1981) (trial court constructively denied defendant right to counsel by appointing new attorney on the day of trial who presented no

the trial court for it to consider whether a meaningful inquiry into defendant's competence can still be had is appropriate is because defendant was examined by several mental health professionals close to his trial date.

18. We need not address whether the trial court abused its discretion in denying the continuance based on defendant's alleged inability to communicate with his counsel because if defendant is found competent after a nunc pro tunc hearing, the denial of the continuance did not constitute an abuse of the trial court's discretion and if defendant is found incompetent, or if a meaningful inquiry cannot be had, the denial of the continuance was obviously an abuse of discretion and per se prejudicial.

19. Defendant represents that prior to that time he was represented by Dale Cannizzaro, who withdrew from the case for medical reasons without filing any pretrial motions in the case.

defense, but only cross-examined the State's witnesses).

[33] In the instant case, even if we assume counsel had four weeks to prepare for the penalty phase of defendant's trial, we cannot say that such an extended period of time was so unreasonably short as to call into question the basic fairness of the proceeding. The situation at hand falls outside the ambit of *Simpson* and *Durio* because defense counsel had an adequate amount of time to prepare for trial. Thus, for the trial court's denial of the motion for continuance based on this ground to constitute reversible error, defense counsel must be able to demonstrate specific prejudice resulting from the denial. Counsel here has not made any specific allegations of prejudice resulting from the denial of this particular motion for continuance, nor has he shown how the mitigation defense was in any way impaired by the denial. *See generally State v. Dupre*, 408 So.2d 1229, 1231 (La.1982). The defense presented seven witnesses in the penalty phase, including a social worker who prepared defendant's psychosocial history, a forensic psychiatrist who examined defendant, defendant's sister, his mother, his former employer, his neighbor and a childhood friend. Defendant's penalty phase counsel obviously had adequate time to develop mitigating evidence. We therefore cannot say either that the trial court abused its discretion in denying the motion for continuance on this ground or that the denial of the motion deprived defendant of a fair trial. The denial did not result in any specific material prejudice to defendant. This portion of this assignment of error lacks merit.

[34] Defense counsel also argues defendant's guilt phase attorney had insufficient time to prepare and thus the motion for continuance to allow counsel additional time to prepare should have been granted. Here, counsel who conducted the guilt phase of defendant's trial was appointed by the trial court to represent defendant on September 28, 1995, eleven months prior to trial. Rec. vol. 1, p. 39. Defense counsel, however, represented to the court that she was only notified of her appointment "at the end of April," some four months before defendant's trial. Rec. vol. 2, p. 332. Even so, defense counsel had an adequate amount of time to prepare for defendant's trial. While four months is not an extensive time to prepare for a capital case, it nonetheless appears sufficient. Furthermore, counsel has not made any specific allegations of prejudice resulting from the denial as to this counsel. Because we cannot say the trial court abused its discretion in denying the continuance on this ground and because no prejudice resulting from the denial has been shown, this portion of the assignment of error lacks merit.

[35] In a related argument, defendant argues that both the time constraints appointed counsel acted under and the mental health problems of defendant combined to destroy defendant's Sixth Amendment right to reasonably competent counsel in the guilt phase of trial under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A claim for ineffective assistance of counsel is generally raised in an application for post-conviction relief. *State v. Burkhalter*, 428 So.2d 449, 456 (La.1983). Post-conviction proceedings enable the district judge to conduct a full evidentiary hearing on the matter. *State v. Hamilton*, 92-2639, p. 4 (La.7/1/97), 699 So.2d 29, 31; *State v. Seiss*, 428 So.2d 444, 449 (La.1983). This court has, however, addressed ineffective assistance of counsel claims on direct review where the record discloses the evidence necessary to decide the issue. *State v. Ratcliff*, 416 So.2d 528, 530 (La.1982). In the present case, however, if the trial court finds on remand that defendant was not able to assist his counsel at the time of trial and therefore reverses defendant's conviction and sentence, defendant's argument of ineffective assistance of counsel at the guilt phase becomes moot. If, on the other hand, the trial court finds defendant was competent at the time of trial, the

issue of ineffective assistance of counsel is relegated to post-conviction proceedings as the record does not contain sufficient evidence for this court to fully explore this issue.

Prior to trial, the defense also moved for a continuance based on the fact that one of defendant's mental health experts "has been unable to complete [psychological] testing of the defendant due to the time constraints attendant to the August 27 trial date." In a related motion heard at the same time, defendant again asked for a continuance because this same expert, Dr. Elaine Salzer, would be out of town during the trial. The trial court denied both motions without reasons.

Dr. Salzer's report was proffered by the defense at the penalty phase of defendant's trial. The report indicated that defendant was tested August 22, 1996. The report authored by Dr. Salzer appears to be comprehensive and does not suggest that her findings were incomplete or inadequate due to a lack of time before trial. Consequently, we cannot conclude that the trial court abused its discretion in failing to grant a continuance on this ground or that defendant was prejudiced by the denial.

Defendant also argues the trial court should have granted a continuance because Dr. Salzer was out of town for the duration of the trial and he wanted to call her as a witness during the penalty phase of his trial. Although the State offered to stipulate that Dr. Salzer would testify consistent with her report, the defense refused to so stipulate, claiming it did "not want this report coming in without her testimony." Rec. vol. 6, p. 1374. The trial court denied the motion for the continuance and accepted defense counsel's proffer of the report for purposes of appellate review.

[36] A motion for a continuance based on the absence of a missing witness must state the facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial, circumstances showing the availability of the witness at the time to which the trial is deferred, and facts showing due diligence used in an effort to procure attendance of the witness. La.C.Cr.P. art. 709; *State v. Rogers*, 553 So.2d 453 (La.1989); *State v. Jackson*, 450 So.2d 621 (La.1984). Generally, the "due diligence" requirement of Article 709 is not satisfied when defense counsel fails to have the potential witness subpoenaed. *State v. Atkins*, 360 So.2d 1341 (La.1978); *State v. Terry*, 359 So.2d 172 (La.1978); *State v. Bennett*, 341 So.2d 847 (La.1976); *State v. Elias*, 230 La. 498, 89 So.2d 51 (1956). The record contains no evidence that Dr. Salzer was ever subpoenaed or that defendant attempted to obtain her presence in any way. Furthermore, at the hearing on the motion to continue the penalty phase based on Dr. Salzer's absence, the State argued that she had never been subpoenaed and the defense did not contradict this assertion. As such, we cannot say that the trial court abused its discretion in failing to continue the penalty phase based on Dr. Salzer's absence.

Assignment of Error No. 5

[37] Finally, in his last assignment of error, defendant argues the trial court erred in denying his motion for a new trial filed pursuant to La.C.Cr.P. art. 851.[20]

20. La.C.Cr.P. art. 851 states:

The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

The court, on motion of the defendant, shall grant a new trial whenever:

(1) The verdict is contrary to the law and the evidence;

(2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error;

(3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty;

Defendant made the same [17] allegations in his motion for a new trial that he presents in the instant appeal: (1) that the verdict is contrary to the law and evidence;[21] (2) that the court's ruling on both written motions, and objections made during the proceedings, show prejudicial error, including a *Batson* motion made during voir dire but then specifically supplemented to include other court rulings; (3) that the court erred in failing to continue the trial to allow defense counsel time to prepare; (4) that the court erred in failing to continue the trial to give defense counsel sufficient time to develop a defense of insanity, then specifically supplemented to include the defense's inability to communicate with the defendant at trial and (5) that the ends of justice would be served by the granting of a new trial, both as to the guilt phase and penalty phase.[22] However, as discussed above, with the exception of the trial court's denial of defendant's motion for continuance based upon his alleged inability to communicate with his counsel, there is no error in the trial court's denial of his motion for a new trial. *Cf. State v. Strickland*, 94-0025, p. 51 (La.11/1/96), 683 [18] So.2d 218, 239 (harmless errors, however numerous, do not aggregate to reach the level of reversible error); *State v. Taylor*, 93-2201 (La.2/28/96), 669 So.2d 364 (unpub'd appx.); *State v. Tart*, 93-0772 (La.2/9/96), 672 So.2d 116; *State v. Copeland*, 530 So.2d 526, 544 (La.1988) (citing *State v. Graham*, 422 So.2d 123, 137 (La. 1982)); *State v. Sheppard*, 350 So.2d 615, 651 (La.1977); *see also State v. Smith*, 95-1826, p. 20 (La.App. 1 Cir. 9/27/96), 681 So.2d 980, 994; *Foster v. State*, 639 So.2d

(4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment; or
(5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

21. Defendant frames one of his claims as an error by the trial court in denying his motion for new trial under La.C.Cr.P. art. 851(1) (trial court shall grant a new trial when the verdict is contrary to the law and the evidence) and also asks the court to examine the evidence under the *Jackson v. Virginia* standard. However, a motion for new trial presents only the issue of the weight of the evidence, *see Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) (setting aside a verdict as against the weight of the evidence, as opposed to the insufficiency of the evidence, under the Due Process Clause does not bar retrial) and is examined under the so-called thirteenth juror standard under which the trial judge re-weighs the evidence. *State v. Voorhies*, 590 So.2d 776, 777 (La.App. 3 Cir.1991). The question of sufficiency is properly raised by a motion for post-verdict judgment of acquittal. La.C.Cr.P. art. 821; *State v. Demery*, 28,396, p. 6 (La.App. 2 Cir. 8/21/96), 679 So.2d 518, 522. *But see* Article 851 comment (d) ("[i]t is the duty of the trial judge to pass upon the sufficiency of the evidence" once ground (1) is raised under Article 851).

In the instant case, the constitutional issue of sufficiency is treated in assignment of error number 1 because the denial of a motion for new trial based upon La.C.Cr.P. art. 851(1) is not subject to review on appeal. *State v. Skelton*, 340 So.2d 256, 259 (La.1976) ("[W]e have uniformly held that a bill of exceptions reserved to the refusal of the trial judge to grant a motion for a new trial based on Article 851(1), relative to sufficiency of the evidence presents nothing for our review.") (citations omitted); *State v. Bartley*, 329 So.2d 431, 433 (La.1976) ("It is well established in Louisiana that an assignment of error reserved to the denial of a motion for a new trial alleging that the verdict is contrary to the law and the evidence presents nothing for appellate review.") (citations omitted).

22. It is settled that a judgment on these grounds (invariably denying the motion) is unreviewable by an appellate court, which may review the grant or denial of a new trial only "for error of law." La.C.Cr.P. art. 858. *See State v. Toomer*, 395 So.2d 1320, 1328 (La.1981) (grant or denial of a new trial under Article 851(5) "presents nothing for this Court's appellate review"); *State v. Williams*, 343 So.2d 1026, 1037 (La.1977) (same), *cert. denied*, 434 U.S. 928, 98 S.Ct. 412, 54 L.Ed.2d 287 (1977); *State v. Cortez*, 503 So.2d 76, 78 (La.App. 5 Cir.1987) (same); *State v. Savoie*, 448 So.2d 129, 135 (La.App. 1 Cir.1984) (same), *writ denied*, 449 So.2d 1345 (La. 1984).

1263, 1303 (Miss.1994) (finding no "near errors" and so rejecting cumulative error analysis). *Cf. Mullen v. Blackburn*, 808 F.2d at 1143, 1147 (5th Cir.1987) (court rejects cumulative error claim and finds that "twenty times zero equals zero"). Those assignments of error which arguably merit the grant of a new trial and reversal of defendant's conviction and/or sentence are thoroughly treated above. Accordingly, this assignment of error is without merit.

CAPITAL SENTENCE REVIEW

[38] Under La.C.Cr.P. art. 905.9 and La.S.Ct.R. 28, this court reviews every sentence of death imposed by the courts of this state to determine if it is constitutionally excessive. In making this determination, the court considers whether the jury imposed the sentence under influence of passion, prejudice or other arbitrary factors; whether the evidence supports the jury's findings with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender. In the instant case, the district judge has not submitted a Uniform Capital Sentence Report (USCR) but the Department of Corrections has submitted a Capital Sentence Investigation Report (CSIR). In addition, the State and the defendant each filed a Sentence Review Memorandum.

The CSIR indicates that defendant is a black male born on March, 21, 1962. He was thirty-four years old at the time of the offense. He was born in Catahoula Parish. His mother and father had a common-law marriage. Defendant, the youngest of seven brothers and sisters, was five years old when his parents split up in 1967. His mother never remarried and he had no real father. Apparently, defendant's sisters took on most of the child rearing responsibilities. However, according to the CSIR, the defendant became closer to his father later in life. Defendant was a "C" student in school, but got "A's" in math. He completed the 12th grade and joined the Marine Corps. He served four years active duty and two years inactive duty and was honorably discharged. Defendant worked for Conti Fleeting for four years as a welder/fitter. He also worked as a truck driver and did waterproofing. He held a job as a security guard for Capitol Protective in 1985 and 1986. CSIR, p. 5.

Defendant and Mary Snyder were married for eight years. They have three children. Quinan, age 11; Allen, Jr., age 9; and Jordan, age 7. According to the CSIR he claims that his wife is drinking and using drugs and believes that he would be a danger to her if he is released. He claims that people have lied to her, telling her that he will be eligible for parole in ten years. CSIR, p. 5.

The CSIR also indicates that the defendant is in fair health. Since being in jail, defendant has developed prostatitis and is having problems with his legs. CSIR, p. 5. Defendant admits to using cocaine in 1989 and also admits the use of marijuana. He successfully completed a substance abuse program several years ago and has been opposed to drugs ever since. CSIR, p. 6.

The defendant has received psychiatric treatment in jail. First, court appointed doctors conducted a competency exam in August of 1996. They found that defendant could understand the proceedings against him and was able to assist in his own defense. According to the CSIR, defendant informed the examining physician that he felt as though his mother emotionally and physically abused him, and claimed that both of his parents drank a lot. He also told doctors of his wife's history of promiscuity noting that she had a five month old child before their marriage and was pregnant by him at the time they married. He recalled that he would not marry his wife until after the child was born for fear that it was not his. CSIR, p. 6. Defendant also indicated to the doctors that he had never abused drugs or alcohol but that he did drink large amounts of beer after work during 1986 and 1987, and suffered from black outs. Doctors diagnosed defendant with depression and pre-

scribed Sinequan, which defendant took through most of his incarceration. The CSIR notes that defendant's depressive disorder is likely secondary to the stress of incarceration and anxiety regarding his situation. CSIR, p. 6.

The Department of Corrections contacted members of the defendant's family to obtain a more complete record of defendant's social history. They spoke with Murray Smith, a friend of the defendant, who indicated that he had known him all of his life. He stated that defendant, "is a [49] very nice guy ... [and they'd] done a lot of things together in their time." CSIR, p. 6. He also informed the interviewer that defendant does not do drugs anymore, that he had been "clean and straight" for twelve years. He also indicated that he knows defendant's wife well and thinks that defendant's case was poorly handled. CSIR, p. 6. The interviewer also spoke with Winnie Walker, defendant's mother. She stated that since defendant had been in jail, his wife sold all of his clothes and that a man named "Ralph" moved into his house. She claimed that the defendant's children are with her all the time because they do not want to return to their mother. She believes that the children are intelligent and know what is going on. Additionally, she does not believe defendant received a fair trial on March 26, 1999. CSIR, p. 6.

The CSIR shows that defendant had no juvenile record but received five years probation for distribution of cocaine on September 27, 1989. Defendant successfully completed his probation and attended a drug abuse clinic. CSIR, p. 5.

In the instant case, the state presented only one aggravating circumstance, that defendant knowingly created a risk of death or great bodily harm to more than one person. The jury agreed. La.C.Cr.P. art. 905.4. The defense presented seven witnesses during the penalty phase.

Passion, Prejudice, and other Arbitrary Factors

The defendant contends that three elements injected passion, prejudice, arbitrariness, and caprice into the proceedings: (1) his defense attorneys failed to present evidence of his "mental defect" during the guilty phase of the trial, thus making the evidence of his depressed state during the crime seem like a last ditch effort to save his life during the penalty phase of the trial; (2) the trial court improperly admitted highly prejudicial photographs; and (3) the district attorney impermissibly appealed to prejudice during his closing arguments by referring to the O.J. Simpson case. All of these factors were discussed in depth above in the individual assignments of error and are without merit. An independent review of the record does not provide any other indication of passion, prejudice or any other arbitrary factors.

Aggravating Circumstances

At trial, the State argued that one aggravating circumstances existed: the offender knowingly created a risk of death or great bodily harm to more than one person. The jury found the existence of this circumstance.

[50] As previously discussed in defendant's claim of insufficient evidence, the evidence presented by the State was sufficient to sustain the finding of all of the elements of first degree murder. The evidence also demonstrated that the defendant knowingly created a risk of death or great bodily harm to more than one person, the victim, Howard Wilson, and the defendant's estranged wife, Mary Snyder. La.C.Cr.P. art. 905.4(A)(4). Consequently, the defendant's sentence of death is firmly grounded on the finding of this aggravating circumstance.

Proportionality

Although the federal Constitution does not require a proportionality review, *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Burrell*, 561 So.2d 692, 710 (La.1990). This court, however, has vacated only one capital sentence on the ground that it was dispropor-

tionate to the offense and the circumstances of the offender, *State v. Sonnier*, 380 So.2d 1, 7 (La.1979), although it effectively decapitalized another death penalty reversal on other grounds. *See State v. Weiland*, 505 So.2d 702 (La.1987) (on remand, the state reduced the charge to second degree murder and the jury returned a verdict of manslaughter).

[39] This court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. *Sonnier, supra.*

The State's Sentence Review Memorandum reveals that since 1976, jurors in the 24th Judicial District, have returned a guilty verdict for a first degree murder charge in 65 cases, including the defendant's case, and recommended imposition of the death penalty 18 times, including the current case. Ten [23] of the 18 cases in which the jury returned a death sentence involved as an aggravating factor the risk of death or great bodily harm to more than one person. The first of the ten cases is that of Benjamin Berry, who fatally shot a law enforcement officer during a bank robbery. Berry was executed in 1987. *State v. Berry*, 391 So.2d 406 (La. 1980); *cert. denied*, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981). The second case is that of Tyronne Lindsey, who killed a shopper in the Oakwood Mall parking lot. After numerous resentencings and a retrial, Lindsey was once again sentenced to death. *State v. Lindsey*, 543 So.2d 886 (La.1989); *cert denied*, 494 U.S. 1074, 110 S.Ct. 1796, 108 L.Ed.2d 798 (1990). The third case is that of Jimmy Robinson, who killed the husband of an apartment complex manager in her presence during an armed robbery. This Court affirmed the conviction but vacated the death sentence and, on remand, Robinson received a life sentence. *State v. Robinson*, 421 So.2d 229 (La.1982). The fourth case is that of Leslie Lowenfield who shot and killed his ex-girlfriend, her daughter, parents and current boyfriend. This court affirmed the conviction and sentence. *State v. Lowenfield*, 495 So.2d 1245 (La.1985), cert. denied *Lowenfield v. Louisiana*, 476 U.S. 1153, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986). The fifth case is that of Glen Keith Weiland, who stabbed his girlfriend and her ex-husband, killing the female victim. This court reversed Weiland's first degree murder conviction. *State v. Weiland*, 505 So.2d 702 (La.1987). On retrial the state amended the indictment to second degree murder. The jury subsequently convicted defendant of manslaughter and he was sentenced to 21 years imprisonment at hard labor. The sixth case is that of Robert Tassin, who shot two victims in the course of an armed robbery/drug deal, one fatally. The court affirmed his conviction and sentence. *State v. Tassin*, 536 So.2d 402 (La.1988). The seventh case is that of Manuel Ortiz, a murder-for-hire case in which the defendant employed a "hitman" to kill his wife and her friend. This Court affirmed defendant's conviction and sentence. *State v. Ortiz*, 96–1609 (La.10/21/97), 701 So.2d 922. The eighth case is that of Julius Lucky, who shot two of his co-workers, one fatally, during the course of an armed robbery. *State v. Lucky*, 96–1687 (appeal pending before this Court). The ninth case is that of Edward Harris, who shot and killed two

23. Two other cases referred to in the State's Capital Sentencing Memorandum have not yet reached this court. Consequently, whether or not the jury found the aggravating factor of risk of death or bodily harm to more than one person is unknown at this time. The cases are as follows:

Elzie Ball shot and killed a delivery man who attempted to stop the armed robbery of a bar owner and employee in progress when he entered the establishment. *State v. Ball*, Docket No. 96–4222, Division "C".

Lawrence Jacobs murdered victim and his mother during the course of an aggravated burglary. *State v. Jacobs*, Docket No. 96–7161, Division "H".

pedestrians in a drive-by shooting. *State v. Harris*, (appeal not yet filed before this court). Last is the case of Damon Thibodeaux who kidnapped, raped and killed Crystal Champagne, a fourteen-year-old girl. *State v. Thibodeaux*, 98–1673 (appeal pending before this court).

[49] The brief outline of the cases above provides strong support for an argument that the death penalty imposed in this case is not disproportionate. In the event that the court decides to resort to use of a statewide basis of comparison, the defendant would be unlikely to fare any better. Cases are legion in which this court has affirmed capital sentences based primarily on the jury's finding that the defendant created the risk of death or great bodily harm to more than one person. *State v. Baldwin*, 96–1660 (La.12/12/97), 705 So.2d 1076 (affirming death penalty based on aggravating factor that defendant created a risk of death or great bodily harm to more than one victim where the defendant shot and killed his estranged wife and the three men with her at the time); *State v. Tart*, 93–0772 (La.2/9/96), 672 So.2d 116 (affirming death penalty where jury found aggravating circumstance that defendant knowingly creating risk of death or great bodily harm to more than one person where defendant murdered his estranged girlfriend and severely wounded her mother); *State v. Sanders*, 93–0001 (La.11/30/94), 648 So.2d 1272 (Defendant killed estranged wife and her new boyfriend, affirmed death penalty based on aggravating factor that defendant created a risk of death or great bodily harm to more than one victim).

DECREE

The conviction and sentence of death are conditionally affirmed on the evidence in the record on appeal. However, a final determination of the appeal is pretermitted, and the case is remanded to the district court for a determination of whether a meaningful inquiry into defendant's competence at the time of trial is now possible and, if so, for an evidentiary hearing and determination on this issue. Defendant's right to appeal from an adverse decision is reserved.

LEMMON, J., concurs in remanding the case to the district court for a reopened hearing on competency to proceed, but otherwise dissents from affirming the conviction and sentence, and assigns reasons.

VICTORY and TRAYLOR, JJ., concur in affirming the defendants conviction and sentence but dissent from the remand.

JOHNSON, J., dissents and assigns reasons.

[1] LEMMON, J., concurring in part and dissenting in part.

The racial bias overtones of the entirety of this rather simple trial require reversal of the conviction and sentence of a black defendant tried by an all-white jury.

Early in the voir dire, the prosecutor accepted a black juror (Brooks). When two other black jurors were peremptorily struck, defense counsel noted their race, but did not attempt to establish a prima facie case of discrimination necessary to make a *Batson* challenge, apparently because one black juror had already been accepted. However, the prosecutor, after peremptorily striking a third black juror, also backstruck Brooks. When required by the judge to give a race-neutral explanation for striking Brooks, the prosecutor stated what essentially was no reason at all, asserting that the juror would miss class as a student teacher and may try to hurry the trial. However, on the previous day when Brooks was accepted, the dean of the school told the judge's clerk that Brooks' missing class would not be a problem, and the prosecutor apparently did not think it would be a problem, since he initially accepted Brooks. The backstriking of Brooks, along with the peremptory challenging of all four of the other blacks on the jury venire, resulted in an all-white jury, and the timing of the Brooks backstrike made the early acceptance of Brooks suspect.

[2] Whether the conviction and sentence should be reversed on the *Batson* issue is a very serious issue. However, the prosecutor's intention to utilize racial bias became crystal clear when he commented during closing argument in the penalty phase that O.J. Simpson "got away with it" in the California verdict that had been rendered shortly before this trial.

Prior to trial, the defense moved to exclude any reference to the Simpson verdict, arguing that this prosecutor "has been all over two parishes talking about 'this is his O.J. Simpson case' " and that any reference to the Simpson verdict, overwhelmingly unpopular in national polls of white citizens, would be extremely prejudicial. The prosecutor did not attempt to explain the relevance of any reference to the Simpson verdict, but gave "my word" that "I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case." The judge stated that, "[b]ased on [the prosecutor's] representations, I'm going to deny your motion."

The prosecutor did not mention the Simpson verdict until closing argument in the penalty phase when he, in effect, urged the all-white jury not to let this O.J. prototype "[get] away with it." The acquittal of Simpson, a high profile black defendant who had threatened to kill himself before his arrest, was totally irrelevant to any issue in the penalty phase of the present case.[1] The prosecutor's attempt to inflame the jury by characterizing Simpson's acquittal as "he got away with it" was highly prejudicial to this black defendant.

[3] I find compelling the rhetorical question by defense counsel in oral argument before this court, asking whether the prosecutor would have ranted about O.J.'s getting away with it if he had not backstruck the only black juror toward the end of voir dire.[2] Racially inflammatory tactics, such as those in the present case, should not be tolerated, even at the expense of the reversal of convictions and sentences obtained by their use. This is the only means this court has to halt similar tactics in the future, perhaps in the guilt phase of the trial of an innocent person.

The senseless carnage by this defendant does not make this a very sympathetic case for the defense. Nevertheless, this defendant is constitutionally entitled to a fair trial that is as free as possible of any aura of racial bias. He did not receive such a trial in this case.

[4] VICTORY, J., concurring in part and dissenting in part.

I agree with all other aspects of the majority opinion, but I dissent from that part of the opinion which finds the trial court erred in failing to investigate defendant's request for a continuance based upon a claim of incompetence and remands the case for a hearing to determine whether a retrospective determination of defendant's competence is possible. I would unconditionally affirm defendant's conviction and sentence.

I note the following from the record:

(1) Defense counsel's motion for a sanity commission in late July, 1996, about a month before trial, contains substantially the same complaints of mental incapacity to proceed as the motion for continuance filed in mid-August, 1996.

(2) A full sanity hearing was held on August 8, 1996. According to Drs. DePrato and McDermott's report:

> [Sinequan] had been effective in abating his depression. However, as his trial

1. The penalty phase of a *capital* case focuses primarily on "the circumstances of the offense and the character and propensities of the offender." The Simpson trial, of course, was not a *capital* case. Therefore, the prosecutor's plea in the *penalty phase* of this case not to let another murderer "[get] away with it" not only was irrelevant to any penalty phase issue, but was an inaccurate comparison since the murderer in this case was already facing a life sentence as a result of the already rendered verdict in the guilt phase.

2. Of course, the vote of only one juror would mandate defendant's being sentenced to life imprisonment.

date approaches, Mr. Snyder's anxiety has escalated. As a consequence of his symptoms, he occasionally has difficulty focusing on questions asked of him and becomes mildly circumstantial and tangential. He is able to be re-directed and can focus his attention when he is provided structure. The results of this evaluation do not provide evidence of cognitive disturbances. He exhibited symptoms consistent with a depressive disorder which is likely secondary to the stress of incarceration and anxiety regarding his current situation. Such symptoms do not interfere with his ability to understand the proceedings against him or to assist in his defense. It is our opinion that Mr. Snyder may benefit from a change in medications. It appears that Sinquan has been maintenanced at a low dose secondary to side effects and may worsen his prostatitis. It is possible that he may benefit from an antidepressant such as Prozac or Zoloft, which can be increased to a level to better control his depressive symptoms. Consequently, it is our opinion, at the time of the evaluation, Mr. Snyder is able to understand the proceedings against him and is able to assist in his defense.

(3) Defendant's medication was changed to Prozac on August 16, 1996. There is *no evidence* that the change to Prozac made defendant's depression *worse*. In fact, Dr. DePrato testified at the sanity hearing that "... some people begin to respond immediately while the full maximum potential can take about six weeks." By the time of defendant's trial, he had been on Prozac for almost two weeks.

(4) At the hearing on defendant's motion for continuance held on August 20, 1996, defendant again did not call his treating physician, Dr. Richoux, as a witness, but proffered his letter dated August 16, 1996, noting the change in medication three days earlier and stating that "... Snyder continues to display severe depressive symptoms that *may* interfere with his ability to assist his attorney...." Yet, Drs. DePrato and McDermott used Dr. Richoux's records of treatment of defendant at JPCC in their evaluation of defendant in their report to the court on August 2, 1996.

Viewed in a light most favorable to defendant, all the hearsay letter possibly shows is that Dr. Richoux *may* have considered defendant's condition to be worse than Drs. DePrato and McDermott did *before* the change in medication, and that, in his opinion, the depression *may* interfere with his ability to assist his attorney. There is no suggestion that Dr. Richoux has ever evaluated defendant's competency to stand trial under the *Bennett* factors, as did Drs. DePrato and McDermott in their exhaustive report to the trial court dated August 2, 1996. Further, it is obvious that Dr. Richoux changed defendant's medication at the suggestion of Drs. DePrato and McDermott, who felt that defendant *might* benefit from Prozac, although Sinequan prescribed by Dr. Richoux had already been effective in abating his depression.

(5) Defense counsel acknowledged that defendant was not incompetent to proceed.

The majority states that "[i]n contrast to the *Lopez* case, the trial court in this case did not undertake any investigation into the allegations made by defense counsel that defendant was having difficulties communicating with her." Maj. Op. at 853. Of course, this is not accurate. These allegations were made by defense counsel in the motion for a sanity commission and the trial court received extensive evidence on the subject at the August 8, 1996 sanity hearing from the testimony of Dr. DePrato and the report presented by Drs. DePrato and McDermott. These doctors discussed the *Bennett* factors at length in their written report and concluded that although the defendant "*occasionally* has difficulty focusing on questions asked of him and becomes *mildly* circumstantial and tangential ... such *symptoms do not interfere with his ability to understand the proceedings against him or to assist in his defense.*"

Defendant had every opportunity to present evidence of his incompetency at the sanity hearing he provoked, but chose not to present any witnesses. The evidence presented by the State at that hearing very strongly proves defendant had the ability to proceed with trial. Merely because on recommendation of the very doctors who found him competent to proceed, his medication was changed to make him *even more competent* to proceed, does not suggest that his competency was or is in question. The trial court allowed defense counsel to testify as to "anything new" of a non-confidential nature that showed defendant was not able to assist her. Instead, she simply continued to reiterate that defendant wanted six weeks to receive the full benefit of the new medication, a fact presented to the trial judge by Dr. DePrato on August 8, 1996 at the sanity hearing *before* he ruled that defendant had the capacity to proceed.

TRAYLOR, concurs in part and dissents in part for reasons assigned by VICTORY, J.

JOHNSON, J., Dissenting.

I would have more confidence in the fairmindedness of this jury and the jury's pronouncement of the death sentence, had the state not used its peremptory challenges to exclude every African American juror, resulting in an all white jury for this black defendant. In my view, this violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), coupled with the prosecutor's inflammatory and prejudicial comparison of this case to the O.J. Simpson trial, require that we set aside the death sentence and remand the case for resentencing.

The Sixth Amendment to the United States Constitution gives a criminal defendant the right to a trial by a jury of his peers. I still believe that racial discrimination in the jury selection process offends the Equal Protection Clause of the Fourteenth Amendment and a pattern of strikes against African American jurors still gives rise to an inference of discrimination. Once the inference of discrimination is present, the prosecutor then has the burden of articulating a race-neutral explanation for striking the African American jurors. The trial judge serves as the gatekeeper, ensuring that racial prejudice, which impedes the securing of equal justice, does not invade our judicial system. As the gatekeeper, the trial judge must decide whether the prosecutor has articulated a genuine concern, or whether the reason articulated is merely a guise to accomplish his/her discriminatory purpose. Verbalized facially neutral reasons can be a pretext for conscious or unconscious racism.

In the present case, the prosecutor's action in accepting the first African–American juror seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions. Nonetheless, defense counsel noted in the record which excluded jurors were African–American. The *Batson* challenges to the remaining three African–American jurors, including the one juror who was accepted and later backstruck, were overruled by the trial court. The trial court accepted the prosecutor's "race-neutral" explanations and the majority found them to be "plausible, supported by the record and race neutral."

The prosecutor's discriminatory intent in excluding all African–Americans from the jury was evidenced by his reference to the O.J. Simpson trial during closing arguments. In *State v. Green*, 94–0887 (La.5/22/95), 655 So.2d 272, 287, we recognized that "for a *Batson* challenge to succeed, it is not enough that a racially discriminatory result be evidenced; rather, that result 'must ultimately be traced to a racially discriminatory purpose.'" Here we have a racially discriminatory result. An all-white jury selected by peremptorily excluding the five African–Americans from the venire, and the prosecutor's racially discriminatory purpose of inflaming the jury by referring to O.J. Simpson getting away with murder in California. Because of the nationwide media focus on O.J. Simpson, the defense made a pre-trial mo-

tion to exclude any references to the O.J. Simpson case. This motion was denied by the trial judge based on the prosecutor's assurance that he would not, at any time during the course of taking evidence or before the jury, mention the O.J. Simpson case.[1] It is blatantly clear that the prosecutor did not intend to keep his word. The prosecutor had no need to make reference to this defendant not getting away with murder during the penalty phase of the trial. At this point, the defendant had already been convicted of the crime, so there was nothing for him to "get away with." The prosecutor utilized the O.J. Simpson verdict to racially inflame the jury's passion to sentence this defendant to death. Such tactics leave no doubt in my mind that the prosecutor had a racially discriminatory purpose for excluding the African-American jurors.

The defense argues that the prosecutor's comments on the O.J. Simpson verdict to this all white jury were devastating and requires that the conviction be reversed. While there is much evidence that the majority of white Americans believe O.J. Simpson was guilty of murdering his wife and that he "got away with it," the prosecutor's improper comments during the penalty phase do not implicate the trial phase. The defendant's own confession, plus the testimony of his ex-wife, Mary Snyder who survived this brutal attack, along with that of Gwen Williams, the witness who came to the aid of Ms. Snyder during the attack, support the defendant's conviction of first degree murder. The prosecutor's improper and clearly inflammatory comments did, however, create a substantial risk that the death penalty would be imposed. In my opinion, the defendant's death sentence should be set aside and this matter remanded for resentencing.

For the aforementioned reasons, I respectfully dissent.

98-0331 (La. 4/23/99)

STATE of Louisiana

v.

Bobby L. HAMPTON.

No. 98-KA-0331.

Supreme Court of Louisiana.

April 23, 1999.

Dissenting Opinion of Judge Johnson, June 15, 1999.

Defendant was convicted in the First Judicial District Court, Caddo Parish, Eu-

1. During the hearing on the pre-trial motion to exclude references to the O.J. Simpson case, the following colloquy occurred:

Prosecutor:

Now, certainly, I can assure the Court that I'm not going to get up in my opening voir dire and say, "we're here for the Jefferson Parish O.J. Simpson court—case." I have no intentions of doing that. I have no—perhaps in argument, I don't know. I don't know. It might be inappropriate, but I think it's premature. And I can assure this Court I will make no reference to the O.J. Simpson case at any time during the course of the taking of any evidence in this case.

Defense Attorney:

That's—Judge, evidence is not what I'm worried about. I'm certain he's not going to ask any witnesses, "don't you think this is a whole lot like the O.J. Simpson case?" I'm concerned about Mr. Williams' famous arguments.

....

Defense Attorney:

And I would ask that the court issue a ruling that Mr. Williams is not to refer to this or to make comparisons in any way with the O.J. Simpson case and that he be held in contempt if he does that.

Prosecutor:

Judge, I ask the court to allow me, as an officer of this Court, to conduct this case in the proper manner, but in the way that I see fit. And, I have given the Court my word that I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case.... So, I have—I give the Court my word that I won't do this. I just ask you not to grant this motion.

....

The Court:

Based on Mr. Williams' representations, I'm going to deny your motion.

80

(9)

No. 06-10119 3-14-07

IN THE

SUPREME COURT OF THE UNITED STATES

ALLEN SNYDER
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF *CERTIORARI*

THIS IS A CAPITAL CASE

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In the Supreme Court of the United States

ALLEN SNYDER, ET. AL., PETITIONER

v.

STATE OF LOUISIANA, ET. AL., RESPONDENT

27 September, 2007

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

NATHAN BUNIVA, **COUNSEL OF RECORD,** REPRESENTING THE STATE OF LOUSIANA (RESPONDENT)

LOTFI SARIAHMED, **COUNSEL OF RECORD,** REPRESENTING ALLEN SNYDER

QUESTION PRESENTED

Whether the State Supreme Court of Louisiana were wrong in its decision to confirm the trial court's ruling that the Petitioner, Allen Snyder should be sentenced to death after being found guilty and reaffirming that the jurors struck during jury selection were not struck due to race.

PARTIES TO THE PROCEEDINGS

In No. 06-10119, the Petitioner is Allen Snyder. The Respondent is the State of Louisiana.

TABLE OF AUTHORITIES

Cases

Miller-El v. Dretke 545 U.S. 231 (2005)

Batson v. Kentucky 476 U.S. 79 (1986)

Swain v. Alabama 380 U.S. 202 (1965)

Statute

Louisiana law LSA-C.Cr.P. art. 795(C)

Constitutional Provision

Equal Protection Clause 14th Amendment

6th Amendment

STATEMENT

The petitioner Allen Snyder was convicted of first-degree murder and sentenced to death in the Louisiana trial court by a jury of his peers. The question presented attempts to touch on the true essence of the case, which is whether in light of United States Supreme Court decision in Miller-El v. Dretke, the Supreme Court of Louisiana correctly affirmed that the prosecution used its peremptory strikes in a non-discriminatory manner.

The history of racial discrimination regarding peremptory strikes in jury selection is a rather straightforward one. In 1965, in *Swain v. Alabama* the U.S. Supreme Court ruled that a State's overt denial of potential jurors solely on the basis of race was in clear violation of the Equal Protection Clause of the U.S. Constitution. However, the burden of proof for the defendant was "crippling" and therefore in 1986 in *Batson v. Kentucky* the Supreme Court eased the requirements of the defendant to prove that the prosecutors' peremptory strikes were based on race. A three-step process to prove racial discrimination was created now known as a Batson challenge:

> "1. The trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race.
> 2. If the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step does not demand an explanation that is persuasive or even plausible; so long as the reason is not inherently discriminatory, it suffices.
> 3. The court must determine whether the defendant has carried his burden of proving purposeful discrimination."

In 2005, the Supreme Court focused on this third and final step in *Miller-El v. Dretke*. The court ruled that the "persuasiveness of the justification proffered by the prosecutor." Furthermore the court said that the burden for proving discrimination ultimately rests with the opponent of the strike. The court further states that the trial court must be very aware and use all evidence to determine the justification proffered by the prosecutor.

ARGUMENT

With the aforementioned history in mind, the court must now consider the case presented before it. In regards to the five African-American jurors that were challenged, it must be stated that the defense raised no Batson claim to three of the struck jurors. Therefore, by not challenging the striking of these three jurors, they must not be considered in this case. This then leaves the court with two African-American prospective jurors, which were struck, Jeffery Brooks and Elaine Scott.

Jeffery Brooks was the potential juror who was originally accepted but later back struck as stated in the petitioner's brief. Jeffery Brooks was a student teacher who appeared "very nervous" throughout the jury selection process. When prompted to give a reason for the strike of Brooks, the prosecutor stated "He's a student teacher/ My main concern is for that reason, that being that he might, to go home quickly, come back with a guilty of a lesser verdict so there wouldn't be a penalty phase." Thus implying Brooks would be worried about how the time away from school would affect both his own schoolwork and his duties as a teacher. As the Constitution states, everyone has a right to a fair trial by a jury of their peers. Jurors who are preoccupied or worried about the outside world and not as committed to a case would be in violation of the 6th Amendment to the U.S.

Constitution. In addition, at the beginning of the jury selection process, Brooks actually approached the bench himself to raise a hardship concern that being a juror would have on his career. Brooks stated, "there is something I'm missing right now that will better me towards my teaching career." Brooks initiated this concern about the trial on his own accord. This explanation clearly has nothing to do with race.

Elaine Scott, the other African American juror who was struck, was very unclear about her ability to apply the law when it came to the death penalty, which is legal in Louisiana. The prosecution stated "I observed she was very weak on her ability to consider the imposition of the death penalty. Her words exactly- I wrote it down, that she thinks she could, and that's the reason for our challenge." If Scott was unclear in her ability to apply the death penalty, then she obviously needs to be taken out of the pool of potential jurors. This again has absolutely nothing to do with race.

CONCLUSION

Keeping in mind that only two peremptory strikes are in question here, it seems rather obvious that the defense was not able to prove that either was based on racial discrimination. Both of the aforementioned potential jurors presented significant legal challenges to the judicial process required in this case, even in light of the recent Miller ruling which requires further analysis of the reasoning given by the prosecutor for the strikes. The prosecution was clearly able to show race-neutral reasoning for the strikes in the Batson claim process.

Additionally, this case raises no substantial legal issues, which the court has not already decided upon. The recent Miller decision addressed a very similar case and helped the Supreme Court of Louisiana in correctly deciding this case.

To briefly address the petitioner's two page rant about the prosecutors intention's in this case: Not only do these claims have no legal merit in this case and are a complete waste of the court's time, but they are completely false. It is ridiculous that such claims would be raised in a petition to the highest court of the land, the United States Supreme Court.

The respondent respectfully requested that the court reject Allen Snyder's petition for writ of certiorari to the United States Supreme Court, as the Court has many more important and pressing issues to handle.

RESPECTFULLY SUBMITTED,

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(10)

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IN THE

SUPREME COURT OF THE UNITED STATES

ALLEN SNYDER
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE LOUISIANA SUPREME COURT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

THIS IS A CAPITAL CASE

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REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF *CERTIORARI*

Petitioner, Allen Snyder, respectfully submits this Reply Brief in support of his Petition for Writ of *Certiorari* seeking review of the decision of the Louisiana Supreme Court.

Introduction

This capital case involves a prosecutor who, prior to Mr. Snyder's 1996 trial, made statements to the media comparing Mr. Snyder's case to the O.J. Simpson case; who, during voir dire, peremptorily struck all five qualified African Americans; and, who, during penalty phase argument, urged the all-white jury he had constructed to sentence Mr. Snyder to death because this case was like O.J. Simpson's, where the defendant "got away with it." Both a majority of the Louisiana Supreme Court and now the State have attempted to bleach any indicia of racially discriminatory intent from the prosecutor's O.J. Simpson's public commentary and argument by contending these remarks did not reveal racial animus because the prosecutor did not state the self-evident: that Mr. Snyder and Mr. Simpson are black.[1] *State v. Snyder*, 942 So. 2d 484, 499 (La. 2006) ("*Snyder III*"); State's Brief, at 15. Mr. Snyder's trial took place less than a year after O.J. Simpson's acquittal. It is difficult to imagine that the members of Mr. Snyder's venire would not have been aware of the racially divisive nature of that case.[2]

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[1] Photographs introduced into the record, *see, e.g.*, State Ex. 20, show that Mr. Snyder is a medium-dark complected African American. That O.J. Simpson is African American is a fact of which this Court can take judicial notice.

[2] Other courts have found more benign references to O.J. Simpson than those made in this case to be evidence of discriminatory intent. *See, e.g., Valdez v. People*, 966 P.2d 587, 596 (Colo. 1998) (prosecutor's comments about the O.J. Simpson case amounted to "references to racial bias during voir dire [that] certainly support the defendant's argument that he established a prima facie case under *Batson*."); *Serrano v. Francis*, 345 F.3d 1071, 1083 (9th Cir. 2003) (in civil rights action, defendant's "racially tinged remarks . . . – specifically, that Francis '[didn't] know how black people think' and that he said that 'he was treating [Serrano] like all the rest . . . and that [Serrano] was 'not O.J. Simpson or Johnnie Cochran,'"

While the prosecutor's successful efforts to parlay the guilty verdict into a death sentence by urging Mr. Snyder's jury to rectify O.J. Simpson's acquittal with its penalty verdict constitute the starkest evidence that the prosecutor violated *Batson v. Kentucky*, 476 U.S. 79 (1986), consideration of the entire record substantiates that the prosecutor intentionally struck African-American panelists on the basis of their race. The State's responsive brief, however, avoids this conclusion by ignoring the record below, dismissing probative evidence of the prosecutor's discriminatory intent, and urging blind deference to the trial court's unreasoned rulings.

Mr. Snyder's Petition presents three questions,[3] which the State reduces to a single, reductionist question: "Whether the state courts properly accepted as race-neutral the reasons given by the state for its removal of those prospective jurors for whom a contemporaneous objection was made." State's Brief, at ii. The State's reduction of the issues may lay the groundwork for its conclusory arguments, but it does not address the legal issues presented in this case and casts aside important and relevant record evidence. The State, for instance, appears to suggest that the Louisiana Supreme Court found that Mr. Snyder's claim, "that the prosecutor made numerous statements to the press and public comparing this case to O.J. Simpson, . . . never [was] and [is] not now, part of the record before this court for review.'" State's Brief, at 15 (citing *Snyder III*, 942 So. 2d at 499). This position is unfounded. Prior to trial, the defense filed two motions contesting the prosecutor's

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constituted evidence of discriminatory intent). *See also* Brief of *Amicus Curiae* Cornell Death Penalty Project in Support of Petitioner Allen Snyder, at 8 ("It is impossible to believe that a prosecutor who struck all of the qualified African American venirepersons was unaware that he had an all-white jury before him, or unaware that an all-white jury would respond more sympathetically to the O.J. Simpson analogy.").

[3] These questions are whether the Louisiana Supreme Court (1) misapplied *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*); (2) erroneously applied the highly deferential standard of review used in *Rice v. Collins*, 546 U.S. 333 (2006); and (3) erred in holding that the failure to preserve a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), can never satisfy the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1986).

public references to his "O.J. Simpson case," R. 159-61, 179-80, and, at hearings on the motions, the prosecutor never disavowed these statements, R. 418-19, 477-79.

This Reply Brief will attempt to refocus the issues to those actually raised by the Petition and clarify the record bases for Petitioner's claims.

I.
The State's efforts to distinguish *Miller-El II* are unavailing

As set forth in detail in the Petition, this case is on all fours with *Miller-El II*. Here, the statistical pattern could not be more striking, as the prosecutor used peremptory challenges to remove one hundred percent of the qualified African-American panelists. *Cf. Miller-El II, supra*, 545 U.S., at 240-41. Likewise, careful scrutiny of the prosecutor's proffered race-neutral reasons for striking Jeffrey Brooks and Elaine Scott reveals both that some of the prosecutor's reasons lack record support and that the State accepted similarly situated white prospective jurors. *Cf. id.* at 241-53; *see infra* at 5-14. Finally, "broader patterns of discrimination," including the prosecutor's pretrial comments and inflammatory O.J. Simpson closing argument, and a history of discriminatory strikes by Jefferson Parish prosecutors bolster a finding that the prosecutor in Mr. Snyder's case intentionally removed African-American prospective jurors because of their race. *Cf. id.* at 253-65.

The State, however, essentially ignores this evidence. Like a majority of the Louisiana Supreme Court, the State erased the statistical pattern of peremptory challenges from the *Batson/Miller-El II* analysis in arguing that three of the five strikes cannot be considered. *See* State's Brief, at 2-5.[4] Likewise, the State did not address the record evidence revealing the prosecutor's

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[4] The State argues that the peremptory challenges to Greg Scott and Thomas Hawkins, Jr., are not properly before the Court because trial counsel failed to raise a *Batson* objection to their removal. State's Brief, at 2-3, 4-5. The State additionally contends that the prosecutor's use of a peremptory challenge to remove Loretta Walker is irrelevant because the defense, on appeal, did not present specific arguments

disparate treatment of similarly situated black and white jurors, and the lack of record support for some of the prosecutor's proffered reasons for striking Jeffrey Brooks and Elaine Scott.[5] *See* State's Brief, at 7-10. And, the State (like the lower court majority) sanitized the prosecutor's O.J. Simpson argument and ignored documented proof that prosecutors in Jefferson Parish routinely exercise peremptory challenges to purge African Americans from capital juries.[6]

The State, moreover, contends that because this case did not involve "jury shuffling,"[7] "graphic scripts" or a manual on how to strike minorities from jury pools, *Miller-El II*'s analysis has no bearing here. State's Brief, at 13-15. This argument misses the forest for the trees. Like prospective jurors, judicial cases "are not products of a set of cookie cutters." *Miller-El II, supra,*

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challenging her removal. *Id.* at 3-4, 6. Regardless of whether the *Batson* challenges to these jurors have been preserved, however, it does not follow that the State's removal of Scott, Hawkins and Walker is inconsequential to the *Batson* analysis. In *Miller-El II*, this Court considered probative the prosecutor's pattern of peremptory challenges, despite focusing solely on only two African-American prospective jurors whom the prosecutor had removed for reason the Court found to be pretextual. *See Miller-El II, supra*, 545 U.S., at 252 n.11. *See, e.g., Kesser v. Cambra*, 465 F.3d 351, 369 n.6 (9th Cir. 2006) (en banc)

[5] The State's discussion of the prosecutor's proffered reasons for striking Brooks and Scott focuses on the race-neutrality of those reasons (which Mr. Snyder has not contested). The State fails, however, to address Mr. Snyder's evidence demonstrating that those race-neutral reasons were pretextual. The strikes of these two jurors are discussed in detail at pages 5-14 of this Brief.

[6] *See* Brief of *Amicus Curiae* Cornell Death Penalty Project in Support of Petitioner Allen Snyder, at 3-8 (discussing prosecutor's O.J. Simpson comments and argument); Brief of *Amicus Curiae* Louisiana Association of Criminal Defense Lawyers, at 15-17 (discussing Jefferson Parish pattern of practice in purging juries of African Americans).

[7] The State's effort to distinguish *Miller-El II* on this basis is misplaced. As Justice Johnson pointed out in her dissenting opinion, "Louisiana does not have the 'jury shuffle,' but we do have a practice that can be used in an equally discriminatory fashion. Louisiana allows parties to use peremptory challenges to 'back strike' jurors pursuant to LSA-C.Cr.P. art 795." *Snyder III, supra*, 942 So. 2d at 508 (Johnson, dissenting). Justice Johnson observed that "the prosecutor's action in accepting the first African-American juror [Jeffrey Brooks] seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions." *Id.* at 506 (quoting *Snyder I*, 750 So. 2d 832, 866 (La. 1999)). The prosecutor later back struck Brooks, thereby "remov[ing] the only African-American juror the State had accepted for service." *Id.* at 501 (Kimball, J., dissenting).

545 U.S., at 247. When Mr. Snyder's "evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination." *Id.* at 265.

II.

Consideration of the voir dire record alone shows that the prosecutor's race-neutral reasons for striking Jeffrey Brooks and Elaine Scott were pretexts for intentional racial discrimination

A more detailed review of the voir dire than was provided by the State demonstrates the pretextual nature of the prosecutor's proffered race-neutral reasons for removing otherwise qualified prospective jurors.

Jeffrey Brooks: When the State announced its intention to use its seventh peremptory challenge to backstrike Brooks, the fourth consecutive peremptory challenge of an African American, the defense objected and requested a race-neutral reason. The prosecutor responded as follows:

> I will provide three. I thought about it last night. Number 1, the main reason is that he looked very nervous to me throughout the questioning. Number 2, he's one of the fellows that came up at the beginning and said he was going to miss class. He's a student teacher. My main concern is that for that reason, that being he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase. Those are my two reasons.

R. 954. The defense countered the prosecutor's purported reasons, arguing:

> His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school and whoever it was and the Dean said that wouldn't be a problem. He was told that this would go through the weekend, and he expressed that was his only concern, the he didn't have any other problems. As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous.

R. 955-956. The prosecutor reiterated, "Mr. Brooks was very uncertain and very nervous looking," but did not offer any illustration to support his claim. R. 956. Without stating any reasons for its

ruling, the trial court overruled the *Batson* challenge: "All right. I'm going to allow the challenge. I'm going to allow the challenge." R. 956.

Even a perfunctory analysis by the trial court would have revealed that these two (rather than three) articulated reasons by the State – nervousness and being in a rush to return to school – were pre-textual.

Nervousness: The State's allegation of "nervousness" finds no support in the voir dire transcript itself and was promptly rebutted by defense counsel. Certainly, "the record seems to indicate that Mr. Brooks was an engaged and voluble juror throughout voir dire examination." *Snyder III*, *supra*, 942 So. 2d at 502 (Kimball, J., dissenting).[8] Brooks provided thoughtful and well-reasoned responses to each question posed,[9] volunteered cogent information during questioning,[10] and expressed a thoughtful and measured approach to serving as a juror.[11] Unsupported in any manner by the transcript, the prosecutor's claim that Brooks "looked very nervous" was a classic mask for a racially motivated strike; and Brooks' responses are indistinguishable from any other

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[8] Justice Kimball authored the original opinion rejecting Mr. Snyder's *Batson* claims. *See State v. Snyder*, 750 So. 2d 832 (La. 1999) (*Snyder I*).

[9] *See, e.g.*, R. 665 (in response to defense counsel's question about whether he could hold defense counsel's decision to enter an insanity plea against counsel and not Mr. Snyder, Brooks queried, "The final decision is his, isn't it?" – an accurate statement of the law); R. 691 (when asked whether he could accord Mr. Snyder the presumption of innocence, he asked how that fit with the earlier explanation that the defense bore the burden of proving insanity).

[10] *See, e.g.*, R. 704 (when defense counsel asked the panel whether anyone could think of a reason that a defendant might not testify, Brooks immediately suggested that "[h]e may say something to destroy his credibility, by accident.").

[11] *See, e.g.*, R. 682-83 (when asked by defense counsel whether he conceivably could believe the testimony of Mr. Snyder over that of a police officer, he responded that he would "weigh what [he] heard.").

jurors in terms of expressing any type of nervousness.[12]

Given the lack of record support for Brooks' claimed nervousness, the trial court's unexplained acceptance of the prosecutor's rationale provides no basis to find this reason credible. As noted by the dissent below: "Without the independent assessment from the trial court verifying the accuracy of the State's generalized and conclusory characterization, the record contains no objective support for the State's demeanor-based justification." *Snyder III*, *supra*, 942 So. 2d at 502 (Kimball, J., dissenting).[13]

Brooks purported anxiety about his teaching schedule: The issue at the heart of the State's second articulated reason was resolved as quickly as it was raised. Prior to the commencement of questioning in panels, Brooks approached the bench upon the court's request that any venire members with hardships present their reasons to the court. He explained that he was an education

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[12] Indeed, the only other time the issue of being nervous was discussed was when Gladys Coleman requested a hardship dismissal because she was diabetic and "gets so nervous a lot." R. 552.

[13] Given the trial court's mute acquiescence to the prosecutor's arguments – particularly on issues for which the record is otherwise silent, such as Brooks' supposed nervousness or Elaine Scott's alleged "enthusiasm" for a life sentence, *see infra* – it is difficult to justify the Louisiana Supreme Court and State's insistence that substantial deference be given to the trial court's rulings. The manner in which voir dire was conducted in this case stands in stark contrast to the proceedings this Court recently reviewed in *Uttecht v. Brown*, _ U.S. _, 2007 U.S. LEXIS 6965 (2007). There, although the Court emphasized (in habeas corpus proceedings brought under the AEDPA) the high deference applied to a trial court's rulings on cause challenges, it stressed "the careful and measured explanations" the judge had given for its rulings. *Id.* at 18. As this Court explained:

> The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment. But where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire*, the trial court has broad discretion.

Id. at *33. In contrast, "careful and measured explanations" for the trial court's rulings simply do not exist in this record. Moreover, as previously noted in Mr. Snyder's Petition, at 15, the Louisiana Supreme Court, in a case reversed on other grounds, chastised this same trial judge for the careless manner in which he considered the defendant's *Batson* challenges. *See State v. Jacobs*, 789 So. 2d 1280,1283, n.2 (La. 2001).

student at Southern University, had just begun his semester and was concerned because, if he sat on the jury, he might miss student teaching hours that were needed to graduate. R. 536. Brooks, however, informed the court that it could contact the dean of his school and inquire if it was possible for him to make up the observation hours and if it would be a problem with his graduation requirements. R. 536-37. After a short time period, during which the trial court addressed the requests of other venire persons, the judge's law clerk returned and reported her conversation with Dr. Tillman, the dean of Mr. Brooks' program. The law clerk stated that "Doctor Tillman at Southern University said that as long as it's just this week, he doesn't see that it would cause a problem with Mr. Brooks completing his observation time within this semester." R. 551. When the judge informed Brooks of this, he was satisfied and expressed no further concerns.[14] R. 551-52.

Following confirmation that jury duty would not affect Brooks' educational plans, neither Brooks, the prosecutor, nor defense counsel raised the issue again – at least not until the State moved to backstrike Brooks and was forced to respond to Mr. Snyder's *Batson* challenge. The State's failure to question Brooks concerning his student-teaching schedule reveals the prosecutor's ruse in proclaiming this a basis for his peremptory challenge. "Had Mr. Brooks's concern about his student teaching commitments genuinely mattered to the State, it would seem to reason that the State would have questioned him about it to determine the extent of his concern." *Snyder III*, *supra*, 942 So. 2d at 501 (Kimball, J., dissenting).

The pretextual nature of the prosecutor's proffered reason is further exposed by considering

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[14] According to the prosecutor, he expected the trial to "be over by Saturday." R. 545. In fact, the trial concluded on Friday, August 30, 1996. The State's speculative account of the possible impact of a lengthy trial on Brooks' ability to complete his student teaching obligations and graduate, *see* State's Brief at 8-9, simply manufactures additional justifications for the strike.

the prosecutor's lack of interest in the scheduling conflicts of several white prospective jurors accepted by the State. Arthur Yaeger, a white male, expressed concern with jury service because he had "a longstanding commitment to an event that's going to take place on Sunday that I've been an integral part of for many years." R. 983. Even given this long-time commitment, however, the prosecutor did not question Yaeger on it further and lodged no challenge against him. Rather, he was accepted by the State and sat on the jury.

Michael Sandras, a white male, reported that he taught at the University of New Orleans and had "just started yesterday and it's the beginning of the semester; so any prolonged absence, it becomes a real problem." R. 982. Sandras admitted that concern about his teaching obligations would cause him to have trouble concentrating and that he would "have to somehow pass on the information concerning work." *Id.* Despite Sandras' admissions, the State never asked him a single question about his commitments and the extent to which he would be distracted or want to avoid a penalty phase in order to "go home quickly." Despite all of this, the State found Sandras acceptable and made no challenge against him.[15]

The dissent in this case found the prosecutor's disinterest in the scheduling conflicts of white jurors highly relevant under *Miller-El II,* noting that the concerns of Brooks, Yaeger and Sandras "seem equally significant[,]" despite being discounted by the majority. *Snyder III, supra,* 942 So.

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[15] In addition, Kelly McMurray, a white female in the second panel, approached the bench with a hardship request, stating that she was a court reporting student at Franklin College, had just started a new job and had a two and a half year old daughter. R. 507. McMurray was actually explicit in stating that she could not be present for an extended trial: "I see no possible way for me, that I would be able to be sequestered. But I would like to be able to stay like on a one day jury trial." *Id.* The trial court denied McMurray's request to be excused. R. 508. Despite these clear issues that would prevent McMurray from concentrating on the trial and would make her more inclined to cut short her jury service by avoiding a penalty phase, the State did not ask a single question on this topic and did not challenge McMurray for cause. McMurray was subsequently struck for cause by the defense on the basis of her automatic death penalty views. R. 830.

2d at 504 (Kimball, J., dissenting). The dissent further observed:

> [I]n no instance did the State question Mr. Sandras or Mr. Yeager about their admitted concern regarding the time they would spend in court, and away from their personal activities, if selected to serve on the jury. . . . The factor that calls the State's strike of Mr. Brooks into question is the total lack of interest prosecutors exhibited in the admitted time concerns of Mr. Brooks, Mr. Sandras and Mr. Yaeger until it needed to justify with race-neutral reasons its strike of Mr. Brooks.

Id. at 504 (Kimball, J., dissenting).

Elaine Scott: The State used its sixth peremptory challenge to remove Elaine Scott, at which time the defense lodged a *Batson* objection. R. 902. The prosecutor responded:

> I observed she was very weak on her ability to consider the imposition of the death penalty. Her words, exactly – I wrote it down, that she thinks she could, and that's the reason for our challenge. . . . And she was very – my notes indicate she was very positive on when I said about a life sentence, she was very positive on her reason – her agreement that she could do that. It's for that reason –

R. 902. The defense countered that Scott "indicated she could consider both. . . . She also said she could consider the death penalty." R. 903. The court again overruled the *Batson* challenge, stating: "All right. I'm going to go ahead and allow the challenge." R. 903-04.

A review of the entire voir dire transcript reveals that these two reasons – being very weak on the death penalty and very positive on a life sentence – should not have been accepted and were simply pretexts for dismissing Scott because of her race.

Weak on the Death Penalty: The first question posed to Scott was whether she could consider imposing the death penalty if Mr. Snyder were found guilty of first degree murder. R. 851. In response, Scott replied affirmatively, "I think I could." R. 852.[16] The prosecutor immediately

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[16] In its brief, the State asserts that Scott's answer "must have been inaudible because before her reply was recorded or heard by the stenographer defense counsel interjected 'I'm sorry, I can't hear you.'" State's Brief, at 10 (citing R. 851). As the below portion of the transcript reflects, defense counsel, just as likely, was indicating her inability to hear the prosecutor's question:

proceeded onto the next prospective juror, Santosh Shah. Shah responded that he could not consider imposition of the death penalty, and the prosecutor engaged in further questioning to determine if Shah's inability to impose the death sentence was a steadfast conviction. R. 852. In fact, each time a prospective juror expressed reluctance about imposing the death penalty, the prosecutor would follow up with at least one question to determine the sincerity of this belief.[17] However, with respect to Scott, the prosecutor did not ask a single follow-up question concerning her ability to impose the death penalty.

It is quite revealing to compare the prosecutor's treatment of Scott with that of Mary Calligan, a white female, who answered that she was "not really sure" when asked if she could consider imposing the death penalty. R. 758. The State intensively questioned Calligan for over three pages of transcript. After this extended questioning, Calligan remained unclear on her position and the prosecutor moved on to another venire person. R. 761. However, the State persisted and

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The State: Ms. Scott, could you consider imposing the death penalty on Allen Snyder if you found him guilty of first degree murder?

The Defense: I'm sorry, I can't hear you?

Ms. Scott: I think I could.

R. 851-52. Certainly, at trial, the prosecutor did not indicate that Scott was soft-spoken, and "when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." *Miller-El II*, *supra*, 545 U.S., at 252.

[17] The prosecutor routinely sought to clarify the answers of white prospective jurors who indicated ambivalence about the death penalty, *see, e.g.*, R. 786-87 (prosecutor's follow-up questions to Karen Davis, who initially testified that she did not think she could impose a death sentence); R. 965-66 (prosecutor's follow-up questions to Anna Reber, who testified that she did not think she could make a sentencing decision either way); or who indicated that they could not impose it, *see e.g.*, R. 636, 752, 753, 754, 787, 849, 832, 921, 966.

returned to Calligan later in voir dire until she eventually stated that she could not consider imposing the death penalty. R. 798. The State successfully challenged her for cause on this basis. R. 829.

In contrast, when Scott, an African American, answered that she thought she could impose the death penalty, she was not asked a single follow-up question by the State; yet, she was struck because the prosecutor claimed she was "very weak" on the death penalty. The State's failure to conduct any meaningful voir dire of Scott with respect to her views on the death penalty, in stark contrast to Calligan, belies the State's argument that "very weak on the death penalty" was the true reason for its peremptory challenge.

Enthusiasm for a Life Sentence: The State's second reason is unsupported by the record. Absolutely nowhere in the voir dire transcript does it reflect what the prosecutor claimed his "notes reflect," i.e., that "she was very positive on when I said about a life sentence, she was very positive on her reason – Her agreement that she could do that." R. 902. In fact, when looking at the prosecutor's questions about jurors' ability to consider a life sentence, it appears not only that Scott was not "very positive" about a life sentence, but that the question she was answering was whether she could consider the death penalty – to which she responded in the affirmative:

The State: Ms. Alvarez, you said that you could not impose the death penalty. Ms. Goff?

Ms. Goff: I could consider the death penalty.

The Defense: I'm sorry, I couldn't hear.

The State: You could consider both?

Ms. Goff: Yes, I would consider it.

The State: Ms. DuBois?

Ms. DuBois: I could consider it, yes.

The State: Mr. Saracione?

Mr. Saracione: I could consider it.

The State: Mr. Saulino, sir?

Mr. Saulino: I could consider it.

The State: Ms. Scott.

Ms. Scott: I could.

R. 859-60.[18] Certainly responding "I could" to the question of whether she could consider the death penalty cannot possibly be interpreted as being "very positive" on a life sentence. The prosecutor's next and last question to Scott was whether she could hold the defense to its burden of proving insanity, to which she replied, she could. R. 866. Defense questioning only once touched upon a life sentence, and then only tangentially; in response to defense counsel's final question regarding Scott's ability to consider mitigating evidence, she hardly displayed enthusiasm for a life sentence:

Defense: Ms. Scott, can you consider mitigating circumstances, you know, a person's upbringing or the kind of life that he led prior to a certain incident in his life, can you consider that in deciding life versus death?

Ms. Scott: Right.

R. 895.

As in *Miller-El II*, the prosecutor "simply mischaracterized [Scott's] testimony," *Miller-El II*, *supra*, 545 U.S., at 244, representing that she enthusiastically endorsed a life sentence over the

[18] Prospective jurors DuBois and Saracione, both giving identical answers to Elaine Scott, were seated as jurors four and five. Saulino was also accepted by the State, but eventually removed by the defense with its fifth peremptory challenge.

death penalty, whereas she expressed no such preference. The prosecutor's proffered reason was thus no reason at all.

III.

The State fails to adequately address the issue raised in Questions Presented No. 2

The second question presented in Mr. Snyder's Petition asks whether the Louisiana Supreme Court erroneously imported into its review on direct appeal the standard of review this Court applied in the AEDPA habeas corpus decision in *Rice v. Collins*, 546 U.S. 333 (2006). The State quickly dispatches this issue, arguing:

> Footnote 6 of the opinion refutes this claim wherein the court noted that "...the standard of review in a federal habeas case is different from that on direct appeal. In the context of a direct review of a *Batson* issue, the trial court's decision on the ultimately question of discriminatory intent by the State is a finding of fact accorded great deference, which finding will not be overturned unless clearly erroneous." *Snyder*, 942 So. 2d at 489.

State's Brief, at 16. While the Louisiana Supreme Court majority opinion did correctly observe, in footnote 6, that the standards of review on direct appeal and in federal habeas corpus proceedings are different, it lost sight of this distinction during the course of its analysis of the *Batson* issues. Rather, the court appears to have to dismissed any idea that the standards of review, while articulated differently, are in actuality distinct. In ultimately concluding that Mr. Snyder could not prevail on his *Batson* claims, the majority turned to *Collins* for support:

> When we view the totality of the evidence discussed herein, as *Miller-El* directs, despite the lack of the trial court's active participation in voir dire and its failure to articulate particularized reasons for its determination that the State's proffered reasons were not pretextual, we find the trial court's decision to allow the strikes of Scott and Brooks was not clearly erroneous. Considering the evidence in the record before us, *a contrary conclusion would be an improper substitution of this court's evaluation for that of the trial court similar to that struck down in Collins*, __ U.S. __, 126 S. Ct. at 973. The record before us simply does not demonstrate that a

> reasonable factfinder *must necessarily conclude* the prosecutor lied about his reasons for striking Scott or Brooks.

Snyder III, *supra*, 942 So. 2d at 499 (emphasis supplied).[19]

As starkly illustrated by the analysis set forth in the Brief of *Amicus Curiae* Louisiana Association of Criminal Defense Lawyers,[20] even before the Louisiana Supreme Court decided *Snyder III*, it had erected an extraordinarily high barrier to appellate relief for claimed *Batson* errors. The *Snyder III* majority's interpretation of *Collins* renders that barrier essentially unassailable by adopting a standard of virtually absolute deference to the trial court, regardless of whether any rationale appears to support the trial court's rulings. *Cf. Uttecht*, *supra*, 2007 U.S. LEXIS 6965, at *33. If the majority's decision is allowed to stand, the promise of equal protection in jury selection will continue to elude the grasp of criminal defendants and minority jurors in Louisiana.[21]

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[19] The majority's conclusion that reversal on direct appeal is required only if the court "must necessarily conclude" that *Batson* was violated contravenes *Collins'* explanation that this standard applies only in federal habeas review under the AEDPA:

> Viewing the panel majority's concerns together, the most generous reading would suggest only that the trial court had reason to question the prosecutor's credibility regarding Juror 16's alleged improper demeanor. That does not, however, *compel the conclusion* that the trial court had *no permissible alternative* but to reject the prosecutor's race-neutral justifications and conclude Collins had shown a *Batson* violation. Reasonable minds reviewing the record might disagree about the prosecutor's credibility, *but on habeas review* that does not suffice to supersede the trial court's credibility determination.

Collins, *supra*, 546 U.S., at 341-42 (emphasis supplied).

[20] *See* Brief of *Amicus Curiae* Louisiana Association of Criminal Defense Lawyers, at 4-20. In light of *Batson*'s bleak history in Louisiana and the difficulties of enforcing the Equal Protection Clause in this context, *amicus* have suggested that this Court should revisit the viability of peremptory challenges. *See id.* at 2, 20. *See also Miller-El II*, *supra*, 545 U.S., at 266-74 (Breyer, J., concurring).

[21] Lower courts in Louisiana have already begun to follow the state supreme court's lead in this regard. As the Fifth Circuit Court of Appeal recently explained in denying relief under *Batson*:

> The Louisiana Supreme Court has found that *Miller-El* does not alter the standard of review for Batson claims on direct appeal. *State v. Elie*, 05-1569 (La. 7/10/06), 936 So. 2d 791,

IV.

The State's response to Question Presented No. 3 miscontrues the Louisiana Supreme Court's holding

In Question Presented No. 3, Mr. Snyder has asked this Court to review the Louisiana Supreme Court's holding that an ineffective assistance of counsel claim can never be predicated on trial counsel's failure to properly raise a *Batson* claim, on grounds that such error "does not prejudice the defendant to the extent that the trial was rendered unfair and the verdict suspect." *Snyder I*, *supra*, 750 So. 2d at 842. *See Snyder III*, *supra*, 942 So. 2d at 493 n.13 (citing *Snyder I*, 750 So.2d at 842) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). In response, the State suggests that Mr. Snyder has prematurely raised this claim because "Louisiana law is well settled that claims of ineffective assistance of counsel are most appropriately addressed in the post conviction application process rather than on an appellate record. . . . The posture of the case precludes adjudicating this claim herein. Relief cannot be based on this claim at this time." State's Brief, at 17-18.

The State's position that Mr. Snyder may raise his *Batson* claim via an ineffective assistance of counsel claim in post-conviction proceedings is wrong. The Louisiana Supreme Court did not

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796; *State v. Snyder*, *supra*. This is evidenced by the recent opinion in *Rice v. Collins*, 546 U.S. 333, 126 S. Ct. 969, 973-974, 163 L. Ed. 2d 824 (2006), in which the Supreme Court restated and employed the three-step *Batson* analysis.

State v. Edwards, _ So. 2d _, 2007 La. App. LEXIS 576 (La.App. 5 Cir. 03/27/07), at *24. *See also State v. Johnson*, _ So. 2d _, 2007 La. App. LEXIS 703 (La.App. 5 Cir. 4/11/07), at *12-13 ("*Miller-El* made it clear that *Batson*'s admonition to consider all relevant circumstances in addressing the question of discriminatory intent requires close scrutiny of the challenged strikes when compared with the treatment of prospective jurors who expressed similar views or shared similar background circumstances . . . . However, in *Collins*, the United States Supreme Court admonished reviewing courts from substituting their evaluation of the record for that of the trial judge.") (citing *State v. Elie*, 936 So. 2d 971, 976 (La. 2006)).

pretermit ruling on the ineffective assistance of counsel claim,[22] but instead addressed the merits and found them lacking. Under the Louisiana Supreme Court's holding, neither Mr. Snyder, nor any other Louisiana criminal defendant, may successfully prosecute an ineffective assistance claim predicated on *Batson* error. As set forth in Mr. Snyder's Petition for Writ of *Certiorari*, there is a split in authority regarding whether the failure to preserve *Batson* error can satisfy *Strickland*'s prejudice prong, and this issue is properly before this Court.

CONCLUSION

"[I]t is virtually impossible for a criminal defendant to succeed on review of a *Batson* claim under the standard as applied in Louisiana." Brief of *Amicus Curiae* Louisiana Association of Criminal Defense Lawyers, at 1-2. In this case, a majority of the Louisiana Supreme Court went out of its way to deny relief and to flout this Court's directive to reconsider Mr. Snyder's *Batson* claim in light of the careful analysis this Court performed in *Miller-El II*.[23]

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[22] The Louisiana Supreme Court routinely holds on direct appeal that claims of ineffective assistance of counsel should be pretermitted to post-conviction proceedings to "allow[] the 'district court in a proper case to order a full evidentiary hearing on the matter.'" *State v. Radcliff*, 416 So.2d 528, 530 (La. 1982) (citation omitted). *See, e.g., State v. Watson*, 817 So. 2d 81, 84 (La. 2002); *State v. Wessinger*, 736 So.2d 162, 195 (La. 1999); *State v. Hampton*, 750 So.2d 857, 877 (La. 1999). Indeed, in *Snyder I*, the Louisiana Supreme Court expressly held that, in the event Mr. Snyder was found to be competent upon remand, those ineffective assistance of counsel claims he had raised on appeal related to his competency be "relegated to post-conviction proceedings as the record does not contain sufficient evidence for this court to fully explore this issue." *Snyder I*, 750 So. 2d at 857.

[23] *See* Brief of *Amicus Curiae* Cornell Death Penalty Project in Support of Petitioner Allen Snyder, at 9-18.

(2)

No. 06-10119

FILED
MAY 21 2007

In The

Supreme Court of the United States

ALLEN SNYDER,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of *Certiorari* To The Louisiana Supreme Court

BRIEF OF *AMICUS CURIAE* CORNELL DEATH PENALTY PROJECT IN SUPPORT OF PETITIONER ALLEN SNYDER

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INTEREST OF *AMICUS CURIAE*

The Cornell Death Penalty Project is an undertaking of the Cornell Law School. One of the Project's primary goals is to address questions of law that carry important implications beyond the facts of any particular case and that involve the basic fairness of the death penalty's administration. Since its inception, the Project has had a particular interest in the influence of racial discrimination on the imposition of the death penalty. *See Turner v. Murray*, 476 U.S. 28, 35 (1986) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.") The Project's approach to these questions of basic fairness, including questions of racial fairness, is informed to the greatest extent possible by reliance on empirical studies of, and relevant to, the capital sentencing process. The Project accordingly seeks to intervene as *amicus curiae* in selected cases presenting important questions of law on which its expertise and experience may be useful to this Court.[1]

I. Introduction and Summary of Argument

Allen Snyder, a black man, was convicted and sentenced to death by an all-white jury for the murder of his wife's male companion. Prior to trial, the prosecutor was quoted in the media as referring to this case as his "O.J. Simpson case," behavior of which the trial judge was aware prior to jury selection because defense counsel twice

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[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity other than amicus curiae and its associated faculty made a monetary contribution to the preparation or submission of the brief in support of the petition. Counsel for both petitioner and respondent consent to the filing of this *amicus curiae* brief.

moved the court to forbid further such racially inflammatory comments. During voir dire, the prosecutor peremptorily struck all five African Americans who had survived cause challenges. Several of his explanations for those strikes cannot be squared with his failure to strike similarly situated white jurors. Then, in summation, he urged the all-white jury he had created to impose death because the Snyder case was like the O.J. Simpson case, where the defendant "got away with it." Despite the egregiousness of the prosecutor's conduct, the Louisiana Supreme Court affirmed the conviction. This Court vacated and remanded for reconsideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005) (hereinafter "*Miller-El II*"). Nonetheless, the Louisiana Supreme Court once more affirmed the conviction.

The lower courts' responses, in various cases, to this Court's *Miller-El* remands present the ugly specter of racially motivated resistance. In *Miller-El v. Cockrell*, 537 U.S. 322 (2002) ("*Miller-El I*"), this Court reversed the Fifth Circuit's decision upholding the district court's denial of a certificate of appealability, and in the process of doing so, laid out specific facts and principles that the Fifth Circuit should consider on remand. Instead, the Fifth Circuit gave short shrift to this Court's careful *Miller-El I* opinion, and affirmed the denial of Miller-El's *Batson v. Kentucky*, 476 U.S. 79 (1986) claim. This Court granted certiorari again, and once more reversed and remanded. *Miller-El II*, 545 U.S. 231.

The Fifth Circuit's resistance to this Court's *Batson* jurisprudence has been mimicked in this case.[2] In *State v.*

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[2] *Hightower v. Terry*, 459 F. 3d 1067 (11th Cir. 2006), *cert. denied*, ___ U.S. ___ (2007), provides another example of lower court defiance. Despite this Court's instruction to the Eleventh Circuit to reconsider its decision in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005), that court held that "*Miller-El* does not control our decision" and that "our opinion

(Continued on following page)

Snyder, 942 So. 2d. 484 (La. 2006) ("*Snyder III*"), the lower court purported to follow this Court's remand order, and quietly, but still obdurately, deviated from the principles laid down in *Miller-El II*. This recalcitrance is particularly shameful in light of the prosecutor's deliberate and premeditated racial purge of the jury, a purge aimed at securing a receptive audience for his racially inflammatory closing argument.

II. The Prosecutor's Premeditated Racial Manipulation of the Jury Demands Condemnation.

At the pretrial hearing defense counsel argued that the prosecutor's public comparison of Mr. Snyder's case to O.J. Simpson's case was designed "[t]o play upon these fears and prejudices to what will doubtless be an overwhelmingly – if not all – white jury deciding a case with admitted similarities is an appeal to racism at worst and vigilante justice at best, and as such is specifically precluded by Louisiana law." R. 160. This prediction turned out to be prescient, and her protest in vain.

When Mr. Snyder's prosecutor turned to jury selection, he did not stop thinking about race. Sometimes, when a prosecutor strikes a black juror and states a reason that comparative juror analysis shows is not the true reason for the strike, it is difficult to know whether the prosecutor has deliberately acted on the basis of race and attempted to conceal his motivations, or whether he has responded to unconscious stereotypes about racial groups so that the influence of race on his actions is not apparent to him. *See*

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in *Hightower v. Schofield* is accordingly reinstated." *Hightower v. Terry*, 459 F.3d 1067, 1069, 1072 (11th Cir. 2006) (Appendix A). Judge Wilson protested that the majority's decision "violates the Supreme Court's express mandate." *Id.* at 1078 (Wilson, J., dissenting).

Batson v. Kentucky, 476 U.S. 79, 106 (Marshall, J., concurring) ("Nor is outright prevarication by prosecutors the only danger here ... A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically). In many cases, however, a review of the entire record excludes the second possibility. This is such a case.

Indeed, this is a case where not only conscious motivation to strike must be inferred, *see* Point III, *infra*, but where it is obvious that the prosecutor consciously struck black jurors in order to facilitate his presentation of a racially charged and wholly improper closing argument. After Mr. Snyder had been indicted, the prosecutor made public statements comparing Mr. Snyder's case to the O.J. Simpson case. The defense filed a motion in limine to preclude the prosecutor from making similar remarks in the future. R. 159-61. As defense counsel explained to the court, "References of the kind referred to above serve no purpose other than as an attempt to confuse and prejudice the jury." R. 160. The prosecutor then deflected an adverse ruling with the representation that he would not mention the O.J. Simpson case "during the course of the taking of evidence or before the jury in this case." R. 418-19.

In hindsight, it is clear this representation was simply a lie. Following the trial court's denial of Mr. Snyder's motion, the prosecutor continued to make remarks to the media concerning his "O.J. case," which led to another defense motion, this one more broadly aimed at prohibiting the attorneys in the case from making any comments to the media. R. 179-80. At the hearing on that motion, defense counsel reported that the previous day she had been asked by a television news reporter to comment "on the second O.J. Simpson case that was scheduled to go to

trial in Jefferson Parish today." R. 478. The prosecutor did not deny or disavow his comments, but demurred that the sequestered jury would not be exposed to publicity, R. 477, and then claimed that he had no intention of discussing the case with the media during the course of the trial. R. 479. Once more, the prosecutor's representations satisfied the trial court, and it denied the motion. R. 479.

This time, the prosecutor's assurances concerning his own future conduct were literally true, but still, just as prevaricating as his response to defense counsel's first motion. Although he made no more comments to the media, what he did was worse: He addressed similar, but even more objectionable comments directly to Mr. Snyder's jury. During his final argument to the jury, the prosecutor urged the jury to sentence Mr. Snyder to death because O.J. Simpson "got away with it":

> [Defense counsel] tried to describe this man as being the man who – And it was 12 hours later when he called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of –

At this point, defense counsel objected, but the trial court overruled her objection, and the prosecutor continued:

> The most famous murder case, and all of you all have heard about it, happened in California very, *very, very similar to this case*. The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, *he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that was what that man*

> *was thinking about when he called in and claimed that he was going to kill himself?*

R. 1591-93 (emphasis supplied).

After the jury returned with a sentence of death, R. 1598, Mr. Snyder filed a motion for new trial. The motion urged that the trial court's erroneous *Batson* rulings required vacation of the conviction and death sentence, R. 199-201. During argument on the motion, defense counsel linked the prosecutor's O.J. Simpson argument with his racially motivated exercise of his peremptory challenges, pointing out that the prosecutor was able to make the O.J. comparison only because he had rid the jury of African Americans. R. 1618. Defense counsel also explained what would seem to be obvious – the racially divisive nature of the prosecutor's O.J. Simpson argument:

> [Y]ou'd have to be in a cave for the last couple of years to not know, and the prosecutor knew exactly what he was doing, to not know that most white people, this was an all white jury, believed that O.J. Simpson was guilty as hell, and that he was getting away with murder, you know. And it's outrageous for the prosecutor to analogize to that case, to this case, which has nothing to do with it . . . [a]nd to hammer this man down, and to get a jury to say, That's right, you know, O.J. Simpson got off, this guy is trying to get off, he's like O.J. Simpson, you know, but we weren't on that jury in California, but we're on a jury here, we can do something about it. And that's totally outrageous.

R. 1617-18.

The Louisiana Supreme Court's *Snyder III* majority dismissed these pretrial comments and penalty phase remarks as irrelevant to the assessment of whether the prosecutor intended to discriminate when he cleared the

jury of all African American potential jurors. First, the Court defended the prosecutor's argument that Snyder should be put to death because O.J. Simpson "got away with it," as a proper response to defense counsel's statement in closing argument that Mr. Snyder had been suicidal when police officers arrived at his home. *Snyder III*, 942 So. 2d at 499. This construction of the prosecutor's remarks failed to note that the prosecutor made similar pretrial comments to the media, which hardly could be responsive to defense counsel's closing argument. The Court also ignored the fact that any argument that Snyder was feigning suicide in response to Simpson's acquittal was factually insupportable, given that Snyder's suicidal behavior occurred weeks *before* Simpson was acquitted.[3]

The majority then concluded that the prosecutor's O.J. Simpson comments did not evince any discriminatory intent, a conclusion facilitated by an astonishing denial of racial realities in this country:

> [O]ther than suggesting inferences to be drawn from the bare facts of the prosecutor's remarks, both prior to and subsequent to the voir dire, defense counsel points to no evidence in the record to substantiate defendant's claim of discriminatory use of peremptory challenges. The inferences defense counsel suggests are no more compelling than other race neutral inferences to be drawn when one considers the prosecutor's remarks in context. The remark at the motion in limine [sic] referred to the fact that the Simpson trial involved alleged domestic violence; the remark during rebuttal referred to the fact that

[3] The O.J. Simpson verdict was returned on October 3, 1995.

> Simpson feigned suicidal intent. *Neither remark referred to Simpson's or Snyder's race.*

Id. at 499 (emphasis supplied).

But the O.J. Simpson analogy had to be aimed at jurors who were familiar with the O.J. Simpson case; it would have been meaningless to anyone else. And it is hard to believe that anyone in America aware of that case did not know that Simpson was black. It is impossible to believe that the jury failed to notice Snyder's race. It is impossible to believe that a prosecutor who struck all of the qualified African American venirepersons was unaware that he had an all-white jury before him, or unaware that an all-white jury would respond more sympathetically to the O.J. Simpson analogy.[4]

The prosecutor's premeditated strategy of purging one racial group and appealing to the racial biases of another was constitutionally intolerable. The Louisiana Supreme Court's "see no evil" response to that intolerable conduct is inexcusable, and warrants correction by this Court.

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[4] Defense counsel's assertion that, in general, African Americans and whites saw the O.J. Simpson case in very different ways, is beyond dispute, and was widely discussed at the time. *See, e.g.*, Martin Gottlieb, *Not Guilty: the Racial Prism; Racial Split at the End, as at the Start,* THE NEW YORK TIMES, 10/4/05.

Research into the communication of racial prejudice confirms that in many settings, explicitly racist comments are rare, due to constraints imposed by widespread acceptance of the norm of equality. Instead, racist evaluations and conclusions are toned down. Speakers with a racial message describe negative acts, leaving the racist conclusions implicit. Teun A. Van Dijk, COMMUNICATING RACISM: ETHNIC PREJUDICE IN THOUGHT AND TALK 48 (1987).

The use of examples – such as the O.J. Simpson analogy made by the prosecutor in this case – to communicate racial messages is common. *Id.* at 90-91.

III. The Louisiana Supreme Court Defied This Court's Order.

Snyder III does not flaunt its defiance of this Court. The Louisiana Supreme Court does not disavow the relevance of *Miller-El II*, does not reinstate its prior decision, and even purports to reconsider that prior opinion in light of *Miller-El II*. Nonetheless, a comparison of this Court's *Miller-El II* opinion and the *Snyder III* opinion makes plain the Louisiana Supreme Court's recalcitrance.

On its first review of Mr. Snyder's claims, the Louisiana Supreme Court denied Mr. Snyder's *Batson* claims by a 5-2 vote, dismissing the strikes of the first two black jurors because defense counsel failed to contemporaneously object to them, then rejecting his related ineffective assistance of counsel claims on the ground that he could show no prejudice from a *Batson* violation, and rejecting his other three *Batson* claims by deferring to the trial court's unexplained rulings, and ignoring the prosecutor's O.J. Simpson analogies. *State v. Snyder*, 750 So. 2d 832 (1999) ("*Snyder I*").

After this Court vacated and remanded *Snyder I*, directing the Louisiana court to reconsider Mr. Snyder's *Batson* claims in light of *Miller-El II*, *Snyder v. Louisiana*, 545 U.S. 1137 (2005), a slimmer majority adhered to prior holding. Although that majority acknowledged the requirement that it review Mr. Snyder's "*Batson* complaints cumulatively in light of the entire record as directed by *Miller-El*," *Snyder III*, 942 So. 2d at 486, it nonetheless concluded that *Miller-El II* "do[es] not require a detailed reconsideration of the voir dire of the five African-American prospective jurors peremptorily struck by the State." *Id.* at 492.

Instead of carefully considering all of the evidence before it, the majority found a reason to dismiss each piece, ignoring the fact that none of those reasons can be squared with this Court's opinion in *Miller-El II*. The majority deferred to the trial court's acceptance of the prosecutor's proffered reasons, even though the Louisiana Supreme Court had previously chastised the judge who credited those reasons for his careless treatment of *Batson* challenges in another capital case, *see State v. Jacobs*, 789 So. 2d 1280, 1283, n. 2 (La. 2001), and even though the prosecutor who proffered those reasons had his credibility tarnished in a previous capital case.[5]

Mr. Snyder argued that the Jefferson Parish District Attorney's Office had practiced race discrimination in jury selection in the past, citing cases previously decided by the Louisiana Supreme Court,[6] a statistical analysis conducted

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[5] The prosecutor was involved in the suppression of material exculpatory evidence in *Kyles v. Whitley*, 514 U.S. 419 (1995), a fact that was brought to the attention of the Louisiana Supreme Court during oral argument.

[6] *See State v. Harris*, 820 So.2d 471, 474 (La. 2002) (finding *Batson* violation where Jefferson Parish prosecutor explained that she was striking African-American juror because he was a "single black male on the panel with no children. . . . I don't want him relating to the defendant more so than he would the State's part of the case"); *State v. Jacobs*, 789 So. 2d 1280 (La. 2001) (though reversing on other grounds, rebuking the same judge who presided over Snyder's trial for the careless manner in which he considered the defendant's *Batson* challenges); *State v. Myers*, 761 So. 2d 498 (La. 2000) (reversing on the ground that the trial court erred in failing to address the defendant's *Batson* challenges to the State's peremptory striking of six of seven African Americans venirepersons). *See also State v. Bridgewater*, 823 So.2d 877 (La. 2002) (all-white jury seated after prosecutor used peremptory strikes to remove prospective black jurors); *State v. Lucky*, 755 So.2d 845 (La. 1999) (entire panel of jurors struck when juror accused prosecutor of using challenges to remove African-American women); *State v. Seals*, 684 So.2d 368 (La. 1996) (all-white jury seated

(Continued on following page)

in another Jefferson Parish case by a Tulane University professor, who concluded that the racial disparity in the state's use of peremptory challenges strongly supports an inference that the Jefferson Parish District Attorney's Office engaged in racially discriminatory jury selection practices;[7] and a climate of racial insensitivity – if not outright animosity – illustrated by prosecutors' wearing of hanging-noose neckties in trial proceedings against African-American defendant Lawrence Jacob.[8] Although the Louisiana Supreme Court majority recognized that *Miller-El II* prohibited "consign[ing] to history"[9] a prosecutor's historical use of peremptory challenges, it dismissed the significance of Mr. Snyder's historical evidence by complaining that consideration of that evidence "would take us outside the four corners of the appellate record. . . ."[10] This dismissive treatment of historical evidence seems both inflexible and disingenuous, given that most of the evidence in question came from cases decided by the Louisiana Supreme Court itself.

The majority next dismissed the significance of three of the five peremptory challenges the prosecutor exercised

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after the prosecutor struck three African Americans over defendant's *Batson* objection); *State v. Durham*, 673 So.2d 1103 (La. Ct. App. 1996) (same).

[7] This study had been introduced into the trial court record following the Louisiana Supreme Court's reversal on *Batson* grounds in *State v. Harris*, *supra*, and was included as an appendix in Harris' writ application to the Louisiana Supreme Court in *State v. Harris*, Sup. Ct. No. 03-KK-3549.

[8] *See, e.g.*, Jeffrey Gettleman, *Prosecutors' Morbid Neckties Stir Criticism*, THE NEW YORK TIMES, 1/5/03, Section 1; Joe Darby, *Prosecutors' Choice of Neckties Blasted; Noose, Grim Reaper Worn in Murder Case*, THE TIMES PICAYUNE, 1/5/03.

[9] *Snyder III* at 488.

[10] *Id.* at 490 n. 8.

against African-American jurors, announcing that "[t]he court's current task is eased by the winnowing out of some of the challenged jurors." *Snyder III* at 493. The majority reiterated its *Snyder I* refusal to consider the prosecutor's strikes against Greg Scott and Thomas Hawkins because, in its view, these strikes had been waived by trial counsel's failure to raise *Batson* objections to their removal. According to the lower court, "There is nothing in *Miller-El* or *Collins* that casts doubt on the correctness of this portion of *Snyder I*." *Id.* at 493. This statement, however, ignores clear and significant language contained in *Miller-El II*.

It is important to note that defense counsel did not affirmatively "waive" the first two black jurors struck by the prosecutor; she simply waited to make a *Batson* motion until the prosecutor had struck the third African American juror, and failed to specifically object to the striking of those two jurors. Nothing in *Batson* suggests that a *Batson* motion must be made when the first African American juror is struck; nothing in *Miller-El II* says so; and nothing in the Louisiana Supreme Court's previous cases said so. In fact, waiting for more than one strike of an African-American juror to bolster the required prima facie case showing, is likely both common and defensible, especially given the Louisiana Supreme Court's stringent view of the prima facie case step of a *Batson* analysis. *See State v. Weary*, 931 So. 2d 297 (La. 2006) (no prima facie case established where prosecutor struck only one black juror).

Nonetheless, it may have been proper to deem claims *focused* on the first two struck black jurors procedurally defaulted based upon trial counsel's failure, at any time, to object to those strikes. Procedural default in this limited sense has the consequence that Mr. Snyder could not prevail if the *only* discrimination he challenged on appeal

was the striking of jurors he had failed to challenge at trial. But Mr. Snyder properly objected at trial to the striking of three jurors, and *Miller-El II* clearly states that "all relevant circumstances" must be considered in evaluating whether the prosecutor acted with discriminatory motivation in striking any prospective juror. *Miller-El II* at 240. Additional strikes of black jurors, especially ones without any apparent justification in the record, are part of the record, and contribute to an inference of discriminatory purpose. *See id.* at 265 ("It is true, of course, that at some points the significance of Miller-El's evidence is open to judgement calls, but when this evidence is viewed cumulatively, its direction is too powerful to conclude anything but discrimination.") Thus, given that Mr. Snyder properly asserted his challenges to two other jurors (both at trial and upon appeal), in dismissing the evidence of discrimination contributed by the strikes of Hawkins and Scott, the *Snyder III* court ignored *Miller-El II*'s counsel. Likewise, the majority erred when it dismissed the relevance of a third African American juror struck by the prosecutor, this time because Mr. Snyder's brief on remand did not raise arguments specifically addressing her removal. That the prosecutor had struck another black juror was relevant for its statistical import in evaluating the strikes to which Mr. Snyder's counsel had objected. Had the lower court followed this Court's instruction to reconsider in light of *Miller-El II*, it would have had to consider that the prosecutor used his peremptory challenges to remove all five qualified African-American jurors – a pattern even starker than that present in *Miller-El II*.

Justice Johnson, in her dissenting opinion, gave a further, case-specific reason for condemning the majority's determination that the defense lawyers' hesitation in making a *Batson* motion was a waiver. The sequence of

events strongly suggests that defense counsel's failure to challenge those strikes when the prosecutor made them was prompted by the prosecutor's devious tactic of accepting the first black juror – and then "backstriking" him later. As Justice Johnson explained, "the prosecutor's action in accepting the first African-American juror [Brooks] seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions." *Id.* at 506 (Johnson, J., dissenting) (quoting *Snyder I*, 750 So. 2d at 866) (Johnson, J., dissenting)). Justice Johnson further observed that the prosecutor's use of a backstrike to remove Brooks in this case paralleled the Texas "jury shuffle" procedure this Court found so suspicious in *Miller-El II*. *Id.* at 508 (Johnson, J., dissenting).

Having transformed five struck African American jurors into two, the majority proceeded to adopt without modification – or reference to *Miller-El II* – its analysis of the remaining jurors. It noted that "[d]espite defense counsel's reiteration of the argument concerning the remaining two potential jurors, we turn to our previous decision regarding these persons," *id.* at 493, and then quoted extensively from its earlier opinion. *Id.* at 493-95 (quoting *Snyder I, supra*, 750 So. 2d at 840-42). Thereafter, the majority observed, "we . . . find nothing [in the voir dire transcript] to disparage the above quoted *Batson* analysis conducted by this court in *Snyder I*." *Id.* at 494.

Noting that "the peremptory challenge of Brooks requires a more detailed discussion than the challenge of [Elaine] Scott," *id.* at 496, the majority elaborated on its *Snyder I* reasoning with respect to the striking of Jeffrey Brooks.[11] According to the majority, the prosecutor's claim

[11] Although Mr. Snyder's petition convincingly sets out reasons to believe that the prosecutor's stated reasons for striking Elaine Scott, as

(Continued on following page)

that he struck Brooks because of his student teaching schedule was not pretextual, despite the fact that he did not strike white jurors who reported scheduling conflicts;[12] the difference, said the majority, was that the scheduling conflicts identified by prospective white juror Sandras and seated white juror Yaeger arose because Brooks was a student, while "both of these men were employed and apparently already had established careers." *Id.* at 496. It then distinguished white juror McMurray's concerns with service on a different ground; hers, the majority said, were focused on childcare problems, rather than her court-reporting classes at Franklin College. *Id.* at 496 n. 16. It is impossible to square this pointillist approach to comparative juror analysis with this Court's opinion in *Miller-El II*, which rejected the dissent's insistence that white panelists are only similarly situated to a struck black juror when they are "identical in all respects," *Miller-El II* at 247 n. 6,

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well as his stated reasons for striking Jeffrey Brooks, were pretexutal, *amicus curiae* focus here on Brooks because the Louisiana Supreme Court's treatment of the evidence concerning Brooks is jarringly inconsistent with this Court's treatment of similar evidence in *Miller-El II*, and provides the strongest support for an inference of recalcitrance.

[12] Prospective white juror Michael Sandras taught at the University of New Orleans and expressed concern that classes had "just started yesterday and it's the beginning of the semester; so any prolonged absence, it becomes a real problem." R. 982. He acknowledged that concern for his classroom obligations would create difficulties for him in concentrating, and that he would "have to somehow pass on the information concerning work." *Id.* Despite his expressions of these concerns, the prosecutor never asked Sandras any questions about *his* commitments, distractions, or motivations to end the trial quickly.

Prospective white juror Arthur Yaeger expressed concern that jury service would interfere with his "longstanding commitment to an event that's going to take place on Sunday that I've been an integral part of for many years." R. 983. The prosecutor neither questioned Yaeger about his concern nor challenged him.

reasoning that "potential jurors are not products of a set of cookie cutters." *Id.* Instead, this Court found "strong similarities" probative of discriminatory intent. *Id.* at 247.

In contrast to the *Snyder III* majority, Judge Kimball tracked this Court's *Miller-El II* approach to comparative juror analysis. She reasoned that the prosecutor's failure to question Brooks about the impact of his teaching schedule on his ability to serve, considered with his apparent disinterest in the scheduling conflicts of other white prospective jurors, revealed that "there was no pre-strike foreshadowing of genuine State concern over the possibility of Mr. Brooks having time-schedule anxieties [and] no attempt made by the State to verify its hypothesis and develop an objective basis for its strike." *Id.* at 502 (Kimball, J., dissenting). There is no plausible excuse for the lower court majority's failure to adopt her approach to the prosecutor's first proffered reason for striking Brooks.

The Louisiana Supreme Court majority's treatment of the prosecutor's second proffered reason for striking Brooks also deviates from *Miller-El's II* commands. The prosecutor alleged that Brooks was "very nervous," an assertion that was belied by both the absence of any confirmation by the trial judge (despite defense counsel's protest that Brooks had displayed no nervousness), and by the engaged responses Brooks provided to questions from both parties. The lower court first asserted that because "nervousness cannot be shown from a cold transcript, . . . the judge's evaluation must be given much deference," *id.* at 496, a proposition that might be true in some cases, but in this case was impeached by Brooks' apparent engagement in the voir dire process, and "voluble" responses to questions.[13]

[13] As the dissent observed, the record reflected "that Mr. Brooks was an engaged and voluble juror throughout voir dire examination.

(Continued on following page)

Then the majority creatively reshaped the prosecutor's assertion into something less transparently impeachable: it reasoned that "the fact that Brooks was articulate during the voir dire may have contributed to the prosecutor's fear that he would get 'smart' during jury deliberation and suggest a verdict lesser than the death penalty." *Snyder III* at 496. Such creativity, however, is prohibited by *Miller-El II*, which held that "A prosecutor simply has got to state his reasons as best he can and stand or fall on the reasons he gives. . . . If the stated reason does not hold up, its pretextual significance does not fade because a trial judge or an appeals court can imagine a reason that might not have been shown up as false." *Miller-El II* at 252.

Finally, the *Snyder III* majority dismissed as irrelevant the prosecutor's pretrial comments and penalty phase argument comparing this case to O.J. Simpson's case by the incredible declaration that those comments lacked racial content. As discussed in Point II, that declaration defies common sense as well as racial realities in this country. In contrast, Justice Kimball, joined by Chief Justice Calogero, concluded that the "voir dire began against a backdrop of the issues of race and prejudice when the State made references to the O.J. Simpson's case," and that the prosecutor's pretrial assurances to the trial court "that he would not refer to O.J. Simpson during the voir dire and evidentiary portion of trial . . . appear disingenuous because the prosecutor clearly referenced the O.J. Simpson case during its rebuttal argument at the penalty phase of trial." *Id.* at 501 (Kimball, J., dissenting);

"*Snyder III* at 502 (Kimball, J., dissenting) "In the absence of the trial court's independent and particularized assessment of Mr. Brooks's demeanor, a reviewing court can only look to the record, which seems to indicate a lack of nervousness and uncertainty on the part of Mr. Brooks." *Id.* at 503 (Kimball, J., dissenting).

see also id. at 506 (Johnson, J., dissenting) (quoting *Snyder I*, 750 So. 2d at 506) (Johnson, J., dissenting)) ("The prosecutor's discriminatory intent in excluding all African-Americans from the jury was evidenced by his reference to the O.J. Simpson trial during closing arguments.")

Justice Kimball, who had written the majority opinion in *Snyder I*, upon reconsidering in light of *Miller-El II*, concluded that "a review of the entirety of this record performed using the vigorous analysis directed by the *Miller-El* Court reveals the trial court erred in allowing the State to peremptorily challenge Mr. Brooks." *Id.* at 100 (Kimball, J., dissenting). Given the history of discrimination in Jefferson Parish; the prosecutor's use of his peremptory challenge to strike all five of the African American jurors who had survived for-cause challenges; the prosecutor's use of a backstrike to eliminate African American juror Jeffrey Brooks; the prosecutor's reliance on two reasons for that strike, both of which were impeached by the record, as well his extraordinary summation, in which he urged the all-white jury he had created to impose death because the Snyder case was like the O.J. Simpson case, where the defendant "got away with it;" and given this Court's opinion in *Miller-El II* – no other conclusion seems possible for a lower court acting in good faith. The Louisiana Supreme Court's decision "correlates with no fact as well" as with defiance. *Cf. Miller-El II*, 545 U.S. at 266 ("The strikes correlate with no fact as well as they correlate with race. . . .").

IV. Race-Based Recalcitrance Demands Correction By This Court.

Just as "[i]t blinks reality to deny that the [Texas prosecutor] struck Fields and Warren . . . because they

were black," *Miller-El II* at 266, it blinks reality to deny that the Louisiana prosecutor who struck all five of the qualified potential black jurors struck none of them because they were black. Yet, the Louisiana Supreme Court blinked this reality, contrary to the direct instruction of this Court.

Miller-El II and *Snyder III* share an issue particularly likely to increase resistance to this Court's rulings: race. In the history of resistance to Supreme Court commands, the most notorious episode of all involves race. Certainly the most widespread, protracted, and violent resistance to this Court's power came in the aftermath of *Brown v. Board of Education*, 347 U.S. 483 (1954), which declared that racially segregated schools violate the Equal Protection Clause of the Fourteenth Amendment. In a story so well-known it needs no footnotes, this Court stayed its course and insisted on adherence to its commands. After widespread footdragging and intransigence from many school boards across the South, the Governor of Arkansas blocked an integration plan approved by the federal courts in pursuance of *Brown*'s mandate. The governor backed off for a brief time, but integration was again halted when the Little Rock school board sought and was granted a long postponement of the desegregation plan. In an opinion signed by all nine justices, this Court rejected that postponement and rejected Arkansas' contention that it was not bound by the *Brown* ruling since it had not been a party to the *Brown* litigation. As this Court forcefully declared, "[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land," which binds "every state legislator and executive and judicial officer . . . " *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

Race-based recalcitrance is particularly dangerous to the Constitution and to this Court. Whether or not the

Louisiana Supreme Court's insubordination in this case stems in part from the fact that a capital conviction is involved, or wholly from the racial issues at stake, that insubordination must be rooted out. This case provides further evidence for the existence of race-based recalcitrance, as well as a clean vehicle for addressing that recalcitrance.

CONCLUSION

A prosecutor should not be permitted to purge a capital jury of African American jurors in order to address his racist argument to an all-white panel, and he should not be permitted to hide behind his bare assertion of race-neutrality in the face of a comparative juror analysis that reveals pretext. A state court cannot by fiat bleach out the patent racial content of that argument. It should not be permitted to defy this Court's remand order and ignore the premeditated violation of the Equal Protection Clause plain on the record in this case. This Court should grant certiorari and affirm its authority, either by a summary reversal, or by plenary review of the case.

Respectfully submitted,

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IN THE
Supreme Court of the United States

ALLEN SNYDER,
Petitioner,

versus

STATE OF LOUISIANA
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Louisiana

BRIEF OF *AMICUS CURIAE* LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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INTEREST OF AMICUS CURIAE

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional organization of attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana. LACDL's mission, includes participation in the legislative process in matters pertaining to criminal law and procedure and, occasionally, acting as amicus curiae in cases where the rights of all are implicated. The LACDL is, from time to time, invited by the Louisiana Supreme Court to submit briefs as *amici* in appropriate cases.[1]

ARGUMENT

I. Introduction and Summary of Argument

In its decisions in *Swain*, *Batson* and now *Miller-el*[2] this Court has fought a losing battle to ensure that a State does not strike any black jurors because of their race while continuing to preserve the peremptory challenge despite its inherent potential to allow such discrimination.

Last month marked the 21st birthday of the *Batson* decision and it is an unhappy coming of age. The sad fact of life is that *Batson* is not achieving its objectives in Louisiana.

A review of the jurisprudence from the Louisiana Supreme Court and the application of the *Batson* standard in that court and Louisiana's intermediate courts of appeal reveals that it is virtually impossible for a criminal defendant

[1] Counsel for the parties have consented to the filing of this brief. This brief was not authored in whole or in part by counsel for a party. No person other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

[2] *Swain v. Alabama*, 380 U.S. 202 (1965); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Miller-El v. Dretke*, 545 U.S. 231 (2005)

to succeed on review of a *Batson* claim under the standard as applied in Louisiana.

This is particularly true given the expansive application of "great deference" to even the most scant trial court rulings. The only time the Louisiana Supreme Court has ever overcome this great deference was where the prosecutor's stated reason for striking the juror was that he was a single black male. *State v. Harris*, 820 So. 2d 471 (La. 2002) Nothing else has been sufficient.

In fact, the appellate record in Louisiana sees *Batson* doing more to protect white prospective jurors from being excluded than blacks.

In the Parish from which this case arises a massive review of jury selection has proven that notwithstanding *Batson*, prosecutors strike black jurors at more than three times the rate they strike white jurors. Outside the artificial bounds of the Louisiana Supreme Court's *Batson* analysis, the reality is that Mr. Snyder, an African American, was sentenced to death by an all white jury in a Parish blighted by racial tensions where only four years earlier David Duke, former Grand Wizard of the Ku Klux Klan, was serving as the duly elected state Representative.

The majority in the Louisiana Supreme Court engaged in an analysis that appears to draw more from the dissent, than the majority in *Miller-el*.

If the narrow and supremely deferential approach taken by the majority is accurate then *Batson* rulings in Louisiana will remain essentially unreviewable and the promise of equal protection will continue to be frustrated.

This Court must intervene to correct the Louisiana Supreme Court's erroneous application of *Batson*, or to revisit *Batson* and peremptory challenges as a whole, to provide more effective protection for criminal defendants and minority jurors.

II. This Court has fought a losing battle to establish a standard of review that accommodates both the

peremptory challenge and the guarantees of Equal Protection

By operation of the Equal Frotection clause, a criminal defendant has the right to trial by a jury whose members are selected by a non-discriminatory criteria and every citizen selected for jury service has the right not to be excluded from a particular petit jury on account of race. *Powers v. Ohio*, 499 U.S. 400 (1991). However, there is an inherent potential in the peremptory challenge to distort the jury process by permitting the exclusion of jurors on racial grounds. *Batson*, 107 (1986) (Marshall J. concurring)

In *Swain* this Court "sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control". *Batson* 92-3 The result was a mechanism for the enforcement of Equal Protection rights that left prosecutor's peremptory challenges "largely immune from constitutional scrutiny." *Batson* 92-3.

Recognizing the "crippling" burden the *Swain* standard imposed upon a criminal defendant, this Court persevered with the peremptory challenge but reset the evidentiary formulation, particularly as to the establishment of a *prima facie* case. *Id.*

Batson permitted an individualized focus on the conduct of the state in the particular case but even as the new formulation was announced, it was predicted that there would be insurmountable problems in prosecutorial and judicial enforcement. *Batson*, 102-3 (Marshall J. dissenting).

While noting Justice Marshall's predictions, the Court proceeded on the assumption that in light of its holding prosecutors would exercise challenges only for legitimate purposes and that trial courts would be willing and able to identify *prima facie* cases of discrimination and conscientiously perform their duties. *Batson, n.22.*

Almost twenty years later, this Court acknowledged the continuing difficulty in "ferreting out discrimination in selections discretionary by nature". *Miller-el, 238.* The Court emphasized that defendants could rely upon the broad

net of *Swain* as well as the individualized focus of *Batson* and provided an example of that analysis at work. *Miller-El, 239-40.* Unfortunately, it is doubtful whether in practical terms the whole described in *Miller-el* is any greater than the sum of its insufficient parts (*Swain* and *Batson*).

Once again, even as the court's decision was announced a concurring justice sounded a note of pessimism and presaged the need for a wholesale review of *Batson* and the system of peremptory challenges. *Miller-El v. Dretke*, 545 U.S. 231 (2005)(Breyer J. concurring)[3]

If *Miller-el* was an attempt to give more teeth to *Batson*, it has failed in Louisiana. The Louisiana Supreme Court has emphasized that *Miller-el* added no new elements to its *Batson* analysis, requiring only "a somewhat expanded review of defendant's *Batson* claims". *State v. Snyder*, 942 So.2d 484, 492 (La. 2006). The message that the Louisiana Supreme Court has taken from this Court's recent *Batson* decisions is not to give *Batson* more teeth but to emphasize the already great deference accorded trial court rulings.[4]

III. It is virtually impossible for a criminal defendant to succeed in review of a *Batson* claim under the standard of review in Louisiana.

(a) Criminal defendants almost never win on review of Batson claims in Louisiana

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[3] This sentiment has since been echoed in Mississippi and Kentucky. *Flowers v. State*, 947 So. 2d 910, 937 (Miss. 2007) (racially motivated jury selection is still prevalent twenty years after *Batson* and a wholesale review of the law is required.); *Morgan v. Kentucky*, 189 S.W. 3d. 99, 115-6 (2006)(Graves J. concurring)

[4] *Snyder*, 492. ("Thus, the most recent admonition by the Supreme Court on jury selection after *Batson* focuses, not on a reviewing court's stringent parsing of a prosecutor's race-neutral reasons to ferret out pretext masking discriminatory intent, but on the leeway a reviewing court must grant a trial court in its evaluation of the credibility of the prosecutor in the third step of the Batson analysis.")

Since *Batson* there have been thirty-two[5] cases where the Louisiana Supreme Court has considered a defendant's *Batson* challenges and reached the merits of those claims. The court has also reached the merits of three cases where state "reverse-*Batson*" challenges were granted.

In that history, the Louisiana Supreme Court has granted defendants relief in only two cases. In one of those cases the trial court had not reached stage three of the analysis and the court considered the question of discriminatory intent *de novo*.[6] In the other, the sole case where the court has overturned a trial court's denial of a defense *Batson* claim, the prosecutor's stated reason for the strike was that the juror was a "single black male . . . with no children".[7] In every other case the court has affirmed, deferring to the judgments of the trial court.

Since *Batson* was announced, the intermediate courts of appeal[8] in Louisiana have reviewed 178 trial court denials of defense *Batson* challenges and have granted relief to the defendant in only four of those cases.[9]

Of those four: one decision was subsequently reversed by the Louisiana Supreme Court, which affirmed the trial court's denial;[10] another involved a trial judge who encouraged the state to discriminate to "even the score" for perceived discrimination by defense counsel;[11] another was

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[5] In two other cases that had been tried before *Batson* was announced the court ultimately ordered remands to allow hearings to be conducted. *State v. Thompson*, 516 So.2d 349, 353 (La. 1987); *State v. Ford*, 489 So.2d 1250, 1264 (La. 1986)

[6] *State v. Collier*, 553 So. 2d 815 (La. 1989)

[7] *State v. Harris*, 820 So. 2d 471 (La. 2002)

[8] The Louisiana Supreme Court hears direct appeals in death cases but may grant supervisory writs in other cases determined on appeal by one of the intermediate appellate courts.

[9] This does not count cases remanded for *Batson* hearings, those procedurally defaulted or those denied before *Griffith v. Kentucky*, 479 U.S. 314 (1987) was announced.

[10] *State v. Elie*, 899 So. 2d 689 (La. App. 1 Cir. 2005)

[11] *State v. Lewis*, 795 So. 2d 468 (La. App. 5 Cir. 2001)

to be reversed on an independent basis in any event;[12] and, in the final case, the state failed to supply any evidence of the struck juror's criminal history to support its race neutral reason to that effect.[13]

A review of Louisiana's *Batson* jurisprudence and the court's application of great deference reveals three virtually insurmountable impediments to meaningful review of trial court *Batson* rulings: trial courts rarely make an explicit finding of a *prima facie* case; trial courts usually do not articulate their reasons for denying a defense *Batson* challenge; and, great deference is granted to the trial court's ruling even when it does not reflect any reliance on matters outside the cold appellate record.

(b) In Louisiana trial courts are not required to state whether a prima facie case has been made out or not.

While the legal threshold for finding a *prima facie* case is intended to be relatively low, it places trial judges in local districts in a difficult position and there is reluctance to making a finding of a *prima facie* case.[14]

The Louisiana Supreme Court has approved a procedure whereby a request for reasons may be made by the trial court or reasons simply received from the prosecutor whether a *prima facie* case is made out or not and has not required trial courts to articulate whether such a finding has been made.[15]

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[12] *State v. Green*, 634 So.2d 503 (La. App. 4 Cir. 1994)

[13] *State v. Knighten*, 609 So. 2d 950 (La. App. 5 Cir. 1992)

[14] For an example of the squeamishness of trial judges in this respect, see *State v. Neal*, 796 So. 2d 649, 654-5 (La. 2001)(When challenged by the prosecutor after asking that reasons be provided the trial judge disavowed any finding of a *prima facie* case)

[15] *State v. Collier*, 553 So. 2d 815, 819 n.5 (La. 1989)("Of course, the trial judge may have believed there was not a prima facie showing, but still required an explanation as a precaution in the event the appellate court determined there was a prima facie showing."); *State v. Granier*, 592 So. 2d 883, 885 (La. App. 4th 1991) citing *Collier*; *State v. Jacobs*, 789 So. 2d 1280, 1283 n.2 (La. 2001)

While it is true that this Court in *Hernandez* held that the question of a prima facie case may be rendered moot once an answer is proffered, this was on the express basis that the trial court "ruled on the ultimate question of intentional discrimination". *Hernandez v. New York*, 500 U.S. 352, 359 (1991).[16] This is not how the rule is applied in Louisiana.

A review of the post-*Batson* cases before the Louisiana Supreme Court shows that when faced with a *Batson* challenge in Louisiana a trial court may take a range of steps but only rarely will this involve an explicit finding that a prima *facie* case has been made out. A trial court may:

- Explicitly decline to find a *prima facie* case and receive no reasons (6 cases);[17]
- Explicitly decline to find a prima facie case but request or receive reasons for the record (7 cases);[18]
- Ask for reasons and give no indication of whether this is as a result of finding a prima facie case or for the purposes of appellate review (11 cases);[19]

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[16] In *Hernandez*, it is apparent from the appellate decision that the trial judge had regard to and accepted the prosecutor's explanation, thereby ruling on the ultimate issue of intentional discrimination. *People v. Hernandez*, 75 N.Y.2d 350, 354 (N.Y. 1990)

[17] *State v. Draughn*, 2007 La. LEXIS 10, 39-41 (La. 2007); *State v. Weary*, 931 So.2d 297, 323, 337 (La. 2006); *State v. Duncan*, 802 So. 2d 533, 543, 547 (La. 2001); *State v. Jacobs*, 803 So.2d 933, 958 (La. 2001); *State v. Bourque*, 699 So.2d 1, 7 (La. 1997); *State v. Tart*, 672 So.2d 116, 140-41 (La. 1996)

[18] *State v. Scott*, 921 So.2d 904, 944 (La. 2006); *State v. Allen*, 913 So.2d 788, 801 (La. 2005); *State v. Robinson*, 874 So.2d 66, 84-85 (La. 2004); *State v. Bridgewater*, 823 So.2d 877, 896-97 (La. 2002); *State v. Robertson*, 712 So.2d 8, 24 (La. 1998); *State v. Davis*, 637 So.2d 1012, Appendix; 1994 La. LEXIS 1327 at **67-69 (La. 1994); *State v. Code*, 627 So.2d 1373, Appendix; 1993 La. LEXIS 3431 at **118 (La. 1993)

[19] *State v. Arceneaux*, 06-KA-2986 (La. 2006) (Record lodged on appeal but not determined); State *v. Manning*, 885 So.2d 1044, 1083-84 (La. 2004); *State v. Ball*, 824 So.2d 1089, 1101 (La. 2002) ; *State v. Neal*, 796 So.2d 649, 656 (La. 2001); *State v. Taylor*, 781 So.2d 1205, 1211 (La. 2001); *State v. Tilley*, 767 So.2d 6, 13 (La. 2000); *State v. Hoffman*, 768 So.2d 542, 557 (La. 2000); *State v. Hobley*, 752 So.2d 771, 782-84 (La. 1999); *State v. Comeaux*, 699 So.2d 16, Appendix; 1997 La. LEXIS

- Remain mute and allow the prosecutor to volunteer reasons (6 cases);[20]
- Explicitly find a prima facie case and require reasons (3 cases).[21]

As a result, reviewing courts often cannot know whether the trial court ruled on the preliminary issue (*prima facie* case) or the ultimate question (credible proffer of race neutral reasons). This is not a theoretical problem and split the Louisiana Supreme Court in this case. The failure to find a *prima facie* case may arise from a legal error in understanding or applying the first stage of the *Batson* test that is masked by the absence of an explicit finding. Further, if not convinced of a *prima facie* case a trial court may never weigh and assess the credibility of a prosecutor's proffered reason.[22]

Notwithstanding this limitation, as the cases referred to above demonstrate, the Louisiana Supreme Court has applied the same standard of "great deference" to the trial court's denial of the *Batson* challenges regardless of whether a *prima facie* case has been explicitly found or not and regardless of whether the trial court has given any indication as to the basis of its ruling.

In the present case, the trial judge sat mute in the face of the *Batson* challenge and the state volunteered reasons without any finding being announced as to whether a *prima facie* case was established.

1719 at **76-77 (La. 1997); *State v. Green*, 655 So.2d 272, 286-88 (La. 1995); *State v. Collier*, 553 So.2d 815, 819 (La. 1989)

[20] *State v. Snyder*, 942 So.2d 484, 494 (La. 2006); *State v. Brown*, 907 So.2d 1, 34 (La. 2005); *State v. Broadway*, 753 So.2d 801, Appendix; 1999 La. LEXIS 2605 at **61-62 (La. 1999); *State v. Williams*, 708 So.2d 703, 727 (La. 1998); *State v. Seals*, 684 So.2d 368, 375 (La. 1996); *State v. Lindsey*, 543 So.2d 886, 898 (La. 1989)

[21] *State v. Elie*, 936 So.2d 791, 795, 799 (La. 2006); *State v. Juniors*, 915 So.2d 291, 316 (La. 2005); *State v. Harris*, 820 So. 2d 471, 474-75 (La. 2002)

[22] In Louisiana, where the trial court does not find a *prima facie* case it is unnecessary to address the credibility of the state's proffered reasons. *State v. Robertson*, 712 So. 2d 8, 24 (La. 1998)

(c) The Louisiana Supreme Court extends great deference regardless of whether the trial court articulates any reasons for its ruling.

In Louisiana, *any* ruling denying a defense *Batson* challenge will be granted great deference, even when the trial court says nothing at all.[23]

A review of the *Batson* cases decided by the Louisiana Supreme Court where a record of the trial court's stated reasons was available provided records of rulings on *Batson* challenges relating to 78 jurors.

The review showed that a trial court in Louisiana faced with a *Batson* objection where there is evidence establishing a *prima facie* case may:

- Refuse to require that any reason be given and deny the *Batson* objection on the basis that a race neutral reason is apparent from the *voir dire* examination of the juror. (3 jurors in 1 case)[24]
- Issue a bare denial of the *Batson* objection without any reasons. (14 jurors across 5 cases)[25]
- Issue a denial stating no more than that the proffered reason was race neutral. (36 jurors across 10 cases)[26]
- Issue a denial and make note of the factors corroborating the proffered explanation. (7 jurors across 5 cases)[27]

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[23] E.g. *State v Seals*, 684 So. 2d 368, 375 (La. 1996)(the trial judge's mute acceptance of the prosecutor's reasons show that they were plausible and not racially motivated)

[24] La. C. Cr. P., art. 795(c); See, *State v. Elie*, 936 So. 2d 791, 797 (La. 2006). See also *State v. Duncan*, 802 So. 2d 533, 551 (La. 2001); *State v. Jacobs*, 803 So. 2d 933, 958-9 (La. 2001)

[25] See for example *State v. Snyder*, 942 So. 2d 484 (La. 2006). Other cases were *Ball, Taylor, Robinson & Bridgewater* (*supra*)

[26] See for example, *State v. Harris*, 820 So. 2d 471 (La. 2002). Other cases were *Scott, Manning, Hobley, Green, Collier, Broadway, Juniors, Williams & Arceneaux* (*supra*)

[27] See, for example, *State v. Neal*, 796 So. 2d 649, 655 (La. 2001). Other cases were *Scott, Hobley, Comeaux & Arcenaux* (*supra*)

- Issue a denial and explicitly note an assessment of the credibility of the prosecutor or the proffered explanation. (18 jurors across 5 cases)[28]

As can be seen from the above, in two thirds of the rulings the trial court issued either a bare denial or a bare statement that the proffered reason was race neutral.

Save for *Harris* each received the same great deference and the trial courts' decisions were upheld each time.

In the present case, the trial judge issued a bare denial of the *Batson* challenge and offered no reasons.

(d) The Louisiana Supreme Court extends great deference regardless of the basis of the trial court's ruling.

The rationale for extending great deference to the trial court is that the trial judge's findings are likely to turn largely on credibility determinations. *Batson*, at n.21.

The advantage of the trial judge over an appellate court arises from the opportunity to observe the juror's demeanor and any visual or auditory clues as well as the opportunity to view the proponent of the peremptory challenge when assessing the credibility of any proffered reason.

However, an analysis of the *Batson* cases reviewed by the Louisiana Supreme Court discloses that the great deference granted trial courts in this arena may be misplaced.

The reasons proffered by the prosecution for its peremptory challenges were available[29] in relation to 90 jurors from 24 cases. Of those, the state proffered a reason that relied on visual or auditory observations of the juror in respect to only 23 jurors.

What is more, as discussed above, in two thirds of *Batson* objections where the court ruled, the court made

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[28] See, for example *State v Tilley*, 767 So.2d 6, 13 (La. 2000). Other cases were *Hoffman*, *Comeaux*, *Lindsey* & *Elie* (*supra*)

[29] The reasons were obtained either from the published decision or from the trial record lodged on appeal.

absolutely no mention of the demeanor or credibility of either the juror or the prosecutor.

In the present case, the trial court did not announce any finding as to credibility or make any findings of fact corroborating the prosecutor's reasons beyond the bare denial of the challenge.

> *(e) By its expansive application of great deference the Louisiana Supreme Court has nullified the application of* Batson v. Kentucky *in all except the most egregious circumstances.*

The Louisiana Supreme Court has elevated great deference to an almost plenary level and has refused to disturb that deference even in the presence of the types of evidence this Court observed in *Miller-el*.

For instance, in Louisiana the disparate treatment of similarly placed jurors has repeatedly been held to be insufficient to displace the great deference accorded a trial court's *Batson* denial.[30]

This continues to be the law in Louisiana even after *Miller*-el was announced, as illustrated in *Juniors*, a case where the state used four out of five peremptory strikes against African American jurors. The *Batson* challenge was denied by the trial court, stating only "All right. I find the State has given race neutral reasons."[31] On appeal the majority acknowledged that the state did not strike white jurors with similar educational levels and with similar equivocation about the death penalty. *State v. Juniors*, 915 So. 2d 291, 317-9 (La. 2005) In fact, the state made an unsuccessful cause challenge against a white juror for

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[30] *State v. Bridgewater*, 823 So. 2d 877, 897 (La. 2002) citing *State v. Taylor*, 781 So. 2d 1205, 1212 (La. 2001). Notably, in *Bridgewater* the trial court explicitly refused to make a finding of a *prima facie* case and reasons were only proffered for the purposes of the appellate record. Appellate Record R.1504-11. Great deference was accorded nonetheless.

[31] First Supplemental Appellate Record, R.354

opposition to the death penalty but seated that juror while striking a merely equivocal black juror. *Juniors*, at 342-3.

Nevertheless, the majority felt constrained to deny relief given "the vast amount of discretion to be accorded to the findings of the trial court". *Juniors* at 319; cf. *Id.* at 341 ("the majority has nullified the application of *Batson v. Kentucky* in all except the most egregious circumstances.")(Johnson J. dissenting)

Even where a reason proffered by a prosecutor is found to be disingenuous, any other reasons given will be accorded full credit and any *Batson* denial will be affirmed under the doctrine of "great deference".[32]

In *Hobley* the Louisiana Supreme Court acknowledged that proffered reasons such as "inattentiveness" must be carefully considered but then elevated the pre-eminence of the trial court's determination in such cases to an insurmountable level.[33]

Further, the court has held that even where the trial court observes disparate treatment of jurors struck because of body language, this will not justify a *Batson* challenge because the prosecutor may have had a different subjective impression from the body language. *Tilley*, at n.5.

In short, nothing has ever been held by the Louisiana Supreme Court to be sufficient to upset the great deference

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[32] *State v. Tilley*, 767 So.2d 6, 18 (La. 2000)("Although the trial court thought that a portion of the state's explanation was "somewhat disingenuous," that does not affect the legitimacy or validity of the state's other reasons.") In *Tilley* the state used 8 of 11 peremptory challenges to strike black jurors and the resulting jury had only one black member.

[33] *State v. Hobley*, 752 So. 2d 771, 784 (La. 1999)("Because the trial record cannot reflect the attentiveness of the venire members during voir dire, we defer to the trial court's determination that the explanation given was reasonable, not a pretext, and legitimately related to the particular case.") Notably, in *Hobley* the trial court did little more than note that the reason proffered was race neutral. The same approach was taken in *Williams*, another case where the trial court simply ruled that the state had supplied race neutral reasons. *State v. Williams*, 708 So.2d 703, 727 (La. 1998) & pp.76 and 161 transcript of voir dire 5/5/95.

owed to the trial court except a prosecutorial confession that she struck a juror because he was black. *Harris* (*supra*)[34]

A comparison with one of the reverse-*Batson* cases shows the Louisiana Supreme Court's deference to be all but plenary and graphically illustrates the arbitrariness of the *Batson* standard in practice.

In *Dunn,* juror Anderson (a white man) testified that he was in favor of the death penalty in most circumstances citing the case of mercy killings as an exception. *State v. Dunn*, 831 So. 2d 862, 871 (La. 2002). This was the reason defense counsel gave for striking this juror. *Id.* at 870. The trial court upheld the state's *Batson* objection to a defense strike stating, "I do not find that you stated a race neutral reason for Mr. Anderson." *Id.* The trial court stated that it reached this conclusion because the juror had stated that he would consider all mitigating and aggravating factors. *Id.*

The Louisiana Supreme Court, cited to the great deference due and the inability of an appellate court to assess intent from a cold record and affirmed the trial court's ruling and Mr. Dunn's death sentence. *Id.* at 872.

By comparison, one or another variation of "weak on the death penalty" was proffered by the state as a reason for using a peremptory strike in respect of 45 of the 90 jurors for whom reasons were available.[35] In every single case the trial court had denied the defense *Batson* objection and bound by "great deference" the Louisiana Supreme Court has affirmed.

In light of this it is perhaps unsurprising that a trial judge recently determined that Louisiana caselaw would not allow

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[34] *Harris* arose in the same judicial district as the present case. The prosecutor argued that "*Batson* is an old case" and despite the express mention of race in the proffered reason the trial court denied the challenge. *Harris*, 474

[35] The traditional reason for valuing prosecutorial peremptory strikes has been to achieve an impartial jury devoid of sympathy with either side due to shared characteristics. *Batson v. Kentucky*, 476 U.S. 79, 125 (1986)(Burger CJ) However, it is clear that prosecution peremptories are used by the state of Louisiana to select the most death prone jury possible.

him to uphold a defense *Batson* objection even though he explicitly found that the state had engaged in race and gender based discrimination and found that the state's proffered reasons were pretextual and designed to camouflage the discrimination. Having regard to Louisiana's jurisprudence and the exceptional character of the *Harris* decision, the trial judge found that the pretextual reasons were not "significantly faulty under Louisiana case law standards to constitute a violation." The conviction was affirmed on appeal and the Louisiana Supreme Court denied writs. *State v. Wilson*, 938 So. 2d 1111 (La. App. 2 Cir., 2006) writ denied *State v. Wilson*, 2007 La. LEXIS 922 (La. 4/20/07).

IV. *Batson* has failed to adequately protect criminal defendants or black jurors from discriminatory jury selection practices in Louisiana

(a) There are more reported cases in Louisiana where Batson *has been used to protect white jurors from being struck than black*

In Louisiana there are far more reported cases in which *Batson* has been successfully used to prevent defense strikes of white prospective jurors than state strikes of black jurors.[36]

Only one reported case in Louisiana applying *Georgia v. McCollum*, 505 U.S. 42 (1992) involved a defense strike of a black juror. *State v. Schexnayder*, 685 So. 2d 357 (La. App. 5 Cir. 1996)(The defendant was white and the victim black). The remaining thirteen cases involved trial courts disallowing defense strikes on white prospective jurors[37] and all save for one resulted in affirmances.[38]

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[36] Challenges by prosecutors to the defense use of peremptory strikes are known in Louisiana as "reverse-*Batson*" challenges. This type of challenge was recognized by this Court in *Georgia v. McCollum*, 505 U.S. 42 (1992)(white defendant seeking to strike black jurors)

[37] Louisiana was one of the first states to recognize the right of prosecutors to bring reverse-Batson challenges where a black defendant

(b) A comprehensive study of jury strike patterns in Jefferson Parish demonstrates that the prosecutors strike African Americans at more than three times the rate of other jurors

In Jefferson Parish a massive study of the type originally required by *Swain* has in fact been conducted. The Louisiana Supreme Court refused to consider this study in the present case as it was conducted after Mr. Snyder's trial and was not included in the trial record. *Snyder* at n.8.

However, the results of this study are relevant to this court in considering whether to grant certiorari as they illustrate the failure of *Batson* to eliminate racially disparate jury selection procedures in Louisiana.

In 2003 Professor Joel Devine, Center for Applied Social Research, Tulane University analyzed the data gathered from 390 trials, involving over 10,000 prospective jurors in Jefferson parish between 1994 and 2002.[39]

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used a peremptory strike against a white prospective juror. *State v. Knox*, 609 So. 2d 803, 804 (La. 1992)

[38] *State v. Tyler*, 723 So. 2d 939 (La. 1998) *State v. Dunn*, 831 So. 2d 862 (La. 2002); *State v. Scott*, 921 So. 2d 904 (La. 2006); *State v. Spencer*, 631 So. 2d 1363, 1365 (La. App. 5 Cir. 1994) writ denied 649 So. 2d 400 (La. 1995); *State v. Moore*, 640 So. 2d 561 (La. App. 3 Cir. 1994); *State v. Ford*, 643 So. 2d 293 (La. App. 2 Cir. 1994); *State v. Payne*, 657 So. 2d 531 (La. Ct. App. 1995); *State v. Ball*, 748 So. 2d 1239, 1241 (La. App. 2 Cir. 1999); *State v. Wade*, 832 So. 2d 977 (La. App. 2 Cir. 2002) writ denied 840 So. 2d 1213 (La. 2003); *State v. White*, 850 So. 2d 751 (La. Ct. App. 2003) writ denied 872 So. 2d 510 (La. 2004); *State v. Stewart*, 866 So. 2d 1016 (La. Ct. App. 2004) writ denied 876 So. 2d 832 (La. 2004); *State v. Singleton*, 2007 La. App. LEXIS 452 (La. Ct. App. 2007); cf. *State v. Wilson*, 632 So. 2d 861 (La. App. 2 Cir. 1994)(Defense challenge of two white jurors disallowed; affirmed on appeal as to one of the jurors, reversed as to the other)

[39] Professor Devine's affidavit containing his analysis and testimony from the lawyer who conducted the survey were accepted in evidence in a pre-trial hearing following the reversal in *Harris* and were filed in the Louisiana Supreme Court as an exhibit to a writ application in that case. *State v. Harris*, Sup. Ct. No. 03-KK-3549

Professor Devine's analysis concluded that prosecutors used peremptory strikes to remove 55% of African-American prospective jurors who were otherwise eligible to serve, but only peremptorily challenged 16% of white prospective jurors in the same position. *Id.*[40]

That is, despite *Batson*, African Americans are struck by the state in Jefferson Parish at more than three times the rate at which white jurors are struck. In Mr. Snyder's case African Americans were struck by the state at more than *four times* the rate of white jurors.

> *(c) In a Parish that is almost one quarter African American, black jurors make up only one twenty fifth of the jurors who have been permitted to sit in post-*Batson *murder trials ending in death verdicts*

Jefferson Parish, from where the instant case arises, is almost one quarter African American[41] and one might reasonably expect juries in the Parish to share this proportion. However a detailed review of court records discloses that this could not be further from the truth.

In short: there have been 20 post-*Batson* murder trials resulting in death sentences in Jefferson Parish;[42] records of juror race is available for 18 of these; 15 of the 18 defendants were black; more than half of the 18 death sentences were handed down by all white juries;[43] the average number of black jurors on each of the 18 trials is a half a juror; African

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[40] See also *Blackstrikes, A Study of the Racially Disparate Use of Peremptory Challenges By the Jefferson Parish District Attorney's Office*, A Report of the Louisiana Crisis Assistance Center, September 2003 available at www.blackstrikes.com

[41] *Census 2000*, United States Census Bureau (2000) shows the African American population at 22.9%, up from 17.6% in 1990.

[42] The other three capital murder trials resulted in sentences of life imprisonment after penalty phase. A death sentence was also imposed in an aggravated rape case but this proceeding is so unique that it was not included in the above analysis – three black jurors were sat in this case.

[43] 10 trials had no African Americans, 7 trials had 1 and 1 trial had 2.

Americans make up a twenty-fifth, rather than a quarter of the jurors.

(d) Applying Batson, *the Louisiana Supreme Court reached a conclusion that there is no evidence of discriminatory intent, defying the reality of a Parish with a history of serious racial disharmony*

The failure of *Batson* in Louisiana is all the more stark when it is observed in a Parish notorious for a long history[44] of racial disharmony.

The unacknowledged reality is that Mr. Snyder, an African American, had his trial conducted before an all white jury in a Parish where only four years earlier David Duke, former Grand Wizard of the Ku Klux Klan, was serving as the duly elected state Representative.[45]

Jefferson Parish is largely made up of what are known as "white flight" suburbs and has long had a negative reputation when it comes to matters of race. The black population in Jefferson Parish has increased, growing 75% since 1980 and now makes up 23% of the Parish.[46] That influx has been met with a steady stream of racially charged incidents involving state actors, including the District Attorney's office itself.

By way of example[47]: in December 1986 Sheriff Harry

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[44] It is more than a hundred years since a lynching at the Amesville jail in 1897 added "another stain to the already scarlet record of Jefferson Parish." *New Orleans Picayune*, September 30, 1897

[45] Obviously, the same voter pool that elected Mr. Duke elected the District Attorney and the trial judge and provided the pool from which the jury was selected.

[46] *Census 2000*

[47] See Frances Frank Marcus, *Louisiana Sheriff Backed After Racial Remark*, N.Y. Times, Dec. 23, 1986, p. A17; *Barricades to Black Drivers Dismantled*, L.A. Times, Feb. 22, 1987, p. 25; Kim Chatelain and Robert Rhoden, *Duke Beats Treen by 227 Votes*, Times-Picayune, Feb. 19, 1989, p. A1; Joe Darby, *Westwego Gets Order for New Black District*, Times Picayune, Oct. 30, 1991, p. B1; Joe Darby, *Jeff Suspect Who Died Was Hog –Tied*, Times Picayune, Mar 22, 1994, p. B1; Bill Walsh, Greg Thomas, Joe Darby and Paul Atkinson, *Lee Pulls Out Cops After Two Deaths*, Times Picayune, Mar. 15, 1994, p. A1; Jeffrey Gettleman,

Lee ordered his deputies to routinely stop and question blacks in largely white areas. In 1987 the Jefferson Parish Council ordered a metal and steel barricade built in the middle of a street bordering Orleans Parish to keep the majority black residents of that parish out of Jefferson. In 1989 David Duke was elected as state representative for the 81st Representative District. In 1991 Jefferson Parish was ordered to establish its first ever majority black voting district. In 1994, two black men died in the custody of the Sheriff's department, at least one of whom was reportedly hog-tied. Reacting to criticisms, Sheriff Lee withdrew police from a black neighborhood and said "To hell with them. I don't need that. I haven't heard one word of support from one black person." In 2003 two Jefferson Parish prosecutors wore ties in court with a noose and a grim reaper painted on them at pre-trial hearings in a capital case involving a black defendant, aged just 16 years at the time of the crime. In 2005, Jefferson Parish officers were discovered to be using a homemade caricature of a black prisoner as target practice. In 2005, deputies fired over 100 bullets at three unarmed black teens, killing a 16-year old sparking allegations of racism. In 2006, in the midst of Hurricane Katrina's devastation, officers armed with shotguns blocked evacuees trying to flee New Orleans across the Gretna Bridge, sparking more outrage from black leaders.

V. The Louisiana Supreme Court's analysis on remand confirms that absent the intervention of this court, *Batson* will remain ineffective in protecting the rights of criminal defendants or black jurors in Louisiana

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Prosecutors' Morbid Neckties Stir Criticism, N.Y. Times, Jan. 5, 2003, p.114; *Target Practices*, Gambit Weekly, Apr. 12, 2005, p.19; Michelle Hunter, *Lee Backs Lethal Response To Chase: More Than 100 Shots Left Teen Driver Dead*, Times Picayune, Jun. 1, 2005, p.1; Gardiner Harris, *Storm And Crisis: Battling The Storm: Police in Suburbs Blocked Evacuees, Witnesses Report*, N.Y. Times, Sep. 10, 2005, p. A13

In the instant case the prosecutor struck all of the black prospective jurors, achieving an all white jury in this black defendant's death penalty trial. The trial court said nothing in immediate response to the *Batson* challenges, the prosecutor offered reasons that applied equally to others and the trial court denied the defense motion without explanation.

The majority in the Louisiana Supreme Court has twice found that no *prima facie* case was established[48] and has given *at least*[49] "great deference" to the credibility finding it has attributed to the sphinx-like trial judge.

Instead of allowing the prosecutor to stand or fall on his stated reasons, the majority bolstered those stated reasons and the entirely unstated reasons of the trial judge by uncovering a factor said to be favorable to the state's use of a peremptory challenge that had not previously been mentioned. *Snyder*, 495.

The broad net of *Swain* was also unavailing. On remand after *Miller-el* was announced, the extra-*voir dire* statements of the prosecutor were held not to support even an inference of race based jury selection, in part because the prosecutor never referred to OJ Simpson's race. *Id.* at 499 Efforts to refer to extensive proof of systematic discrimination in jury selection in the Parish were held to be *dehors* the record; a record first established under pre-*Miller-el* law. *Id.* at 490.

Overall, the majority, appears to have engaged in an analysis that appears to draw more from the dissent, than the majority in *Miller-el*.

If the narrow and supremely deferential approach taken by the majority is accurate then *Batson* rulings in Louisiana

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[48] *State v. Snyder*, 942 So. 2d 484, 494 (La. 2006) ("Defendant, the opponent of the strikes, offered no facts or circumstances supporting an inference that the State exercised its strikes in a racially discriminatory manner.") adopting the language of its original affirmance in *State v. Snyder I*, 750 So. 2d 832, 840-842 (La. 1999).

[49] Weimar J. writing for the majority concluded that "The record before us simply does not demonstrate that a reasonable factfinder must necessarily conclude the prosecutor lied about his reasons for striking Scott or Brooks." *Snyder* at 499

will remain essentially unreviewable and the promise of equal protection will continue to be frustrated.

Recognizing the problems with the state's conduct and the trial court's actions, the dissent, was unable to discern the basis upon which the defense *Batson* challenge was rejected and was unwilling to assume the existence of a credibility finding to which deference would be appropriate. The dissent correctly concluded that relief should be granted.

CONCLUSION

This court has been forced to intervene numerous times due to the failure of the Louisiana Supreme Court to accurately or effectively enforce the dictates of Equal Protection in jury selection.[50] Once again this Court must intervene to protect the rights of criminal defendants and African American jurors and correct the Louisiana Supreme court's erroneous interpretation and application of *Batson*.

However, if the Louisiana Supreme Court correctly described the *Batson* analysis, this court should still intervene because the analysis the state court described has proven itself incapable of delivering Equal Protection and if that is truly the law then it must be revisited.

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[50] *Pierre v Louisiana*, 306 U.S. 354 (1939); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); Alexander v. Louisiana, 405 U.S. 625 (1972); *Campbell v. Louisiana*, 523 U.S. 392 (1998)

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No. 06-10119

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In The Supreme Court of the United States

ALLEN SNYDER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ Of *Certiorari* To The Supreme Court Of Louisiana

JOINT APPENDIX
Volume I, Pages 1 to 351

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Petition For *Certiorari* Filed March 14, 2007
***Certiorari* Granted June 25, 2007**

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GRAND JURY

JUDGE PATRICK MCCABE DIVISION F DATE 9/14/95

PARTIAL RETURN OF THE JEFFERSON PARISH GRAND JURY:

CLERK POLLED THE MEMBERS OF THE GRAND JURY:

PRESENT WERE:

STACY MORRISON – FOREPERSON
CLIFTON ROUSSEL
SCOTT PARETTI
KATHLEEN HULL
TAMMY PERCLE
VERNON COBB
JASON BARR
EARL ORTEGO
TONYA DUKE
JOEL PICKER
MARY STUCKEY
ERNEST WILLIAMS

ABSENT WERE:

AFTER BEING SWORN IN AND TAKING THE STAND, THE FOLLOWING REPORT WAS MADE BY:

STACY MORRISON – FOREPERSON

ALLEN SNYDER – INDICTMENT FILED – A TRUE BILL FOR THE CHARGE OF FIRST DEGREE MURDER R.S. 14:30. NO BOND SET ON MURDER CHARGE, $250,000.00 BOND SET ON ATTEMPTED FIRST DEGREE MURDER BY JUDGE MCCABE. IN JAIL.

TONY D. BARCONEY A/K/A ANTHONY C. DOWNS – INDICTMENT FILED – A TRUE BILL FOR THE CHARGE OF SECOND DEGREE MURDER R.S. 14:30.1. $500,000.00 BOND SET BY JUDGE TIEMAN. IN JAIL.

LUTGARDO R. SILVA – INDICTMENT FILED – A TRUE BILL FOR THE CHARGE OF SECOND DEGREE MURDER R.S. 14:30.1. PREVIOUS BOND CANCELLED. NEW BOND SET AT $500,000.00 BY JUDGE MCCABE. DEFENDANT NOT IN JAIL.

ALLEN SNYDER 95-5114 DIV H
TONY BARCONEY AKA: ANTHONY DOWNS 95-5113 DIV G
LUTGARDO SILVA 95-5112 DIV D

REPRESENTING THE DISTRICT ATTORNEY'S OFFICE WAS ASSISTANT DISTRICT ATTORNEY, MARION EDWARDS

IT IS ORDERED BY THE COURT, THAT THE FINDINGS OF THE GRAND JURY OF THIS PARTIAL RETURN BE FILED WITH THE CLERK OF COURT, AND THE ACCUSED FOR WHOM A TRUE BILL WAS FOUND, BE BROUGHT INTO THE COURT TO BE ARRAIGNED. IF THE ACCUSED FOR WHOM A TRUE BILL WAS FOUND IS NOT IN CUSTODY, LET A WARRANT BE ISSUED FOR THEIR ARREST.

THOSE FOR WHOM A NO TRUE BILL WAS RETURNED, THEIR BONDS ARE CANCELLED, IF ANY, AND THEY ARE TO BE RELEASED FROM CUSTODY, IF INCARCERATED.

/s/ [Illegible]
DEPUTY CLERK

[ARRAIGNMENT] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	10/20/95

DA: JAMES A WILLIAMS COURT REPORTER: KERRY WESTMORELAND

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS DAY.

THE DEFENDANT WAS REPRESENTED BY MIKE SOMOZA WHO WAS STANDING IN FOR MARK NOLTING

READING OF THE BILL WAS WAIVED AND A PLEA OF NOT GUILTY WAS ENTERED, WHICH PLEA WAS ORDERED RECORDED.

THE COURT GRANTED 15DAYS FOR THE DEFENDANT'S COUNSEL OF RECORD TO FILE RESPONSIVE PLEADINGS.

Motions SET FOR THE 15 DAY OF DECEMBER, 1995.

TRIAL SET FOR THE 22 DAY OF APRIL, 1996.

/s/ Becky Loup
DEPUTY CLERK

ENTRY: 1

[CONTINUANCE] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	12/15/95

DA: JAMES A WILLIAMS COURT REPORTER: KERRY WESTMORELAND

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY ATTORNEY.

THE NAME ATTORNEY WAS ORDERED: CONTINUED AND RE-SET FOR THE 05 DAY OF JANUARY, 1996.

THE ACTION WAS TAKEN AT THE REQUEST OF THE ASSISTANT DISTRICT ATTORNEY.

THE DEFENDANT WAS REMANDED TO PARISH PRISON.

/s/ Becky Loup
DEPUTY CLERK

ENTRY: 2

[FORM 10] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	01/05/96

DA: JAMES A WILLIAMS COURT REPORTER: KERRY WESTMORELAND

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY DALE CANNIZZARO, ATTORNEY.

DATE TO RETAIN ATTORNEY -SATISFIED-
FRANK LARRE
TRIAL DATE SET 4-22-96
DEFENDANT WAS REMANDED TO PARISH PRISON

/s/ Becky Loup

ENTRY: 3

[CONTINUANCE] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER: 9505114
VERSUS	DIVISION: H
ALLEN SNYDER	COMPLAINT: H1442395
	DATE: 05/20[4]/96
DA: JAMES A WILLIAMS	COURT REPORTER: KERRY WESTMORELAND

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY DALE CANNIZZARO, ATTORNEY.

THE DISCOVERY MOTIONS WAS ORDERED: CONTINUED AND RE-SET FOR THE 28 DAY OF JUNE, 1996.

THE ACTION WAS TAKEN AT THE REQUEST OF THE DEFENSE ATTORNEY.

THE DEFENDANT WAS REMANDED TO PARISH PRISON.

/s/ Becky Loup
DEPUTY CLERK

ENTRY: 4

[CONTINUANCE] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	06/28/96

DA: JAMES A WILLIAMS COURT REPORTER: KERRY WESTMORELAND

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY GRAHAM DAPONTE, ATTORNEY.

THE DISCOVERY MOTIONS WAS ORDERED: CONTINUED AND RE-SET FOR THE 10 DAY OF JULY, 1996.

THE ACTION WAS TAKEN ON A JOINT MOTION OF THE ASSISTANT DISTRICT ATTORNEY AND THE ATTORNEY FOR THE DEFENSE.

THE DEFENDANT WAS REMANDED TO PARISH PRISON.

/s/ Becky Loup
DEPUTY CLERK

ENTRY: 5

[FORM 10] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	07/10/96
DA: JAMES A WILLIAMS	COURT REPORTER: FAYE CEMO	

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY GRAHAM DAPONTE, ATTORNEY.

MOTION TO SUPPRESS THE STATEMENT TAKEN UP
DEFENSE ORAL MOTION FOR SECRETATION [sic] OF WITNESSES – GRANTED
S-W DEBBIE LABIT – JPSO
S-1 DOCUMENT
S-2 DOCUMENT
STATE SUMITTED [sic]
DEFENSE ORAL MOTION TO RE-OPEN THIS MOTION IF AFTER LISTENING TO TAPE HAS QUESTIONS – GRANTED
THE COURT DENIED MOTION TO SUPPRESS THE STATEMENT

MOTION TO SUPPRESS THE ID TAKEN UP
S-W DEBBIE LABIT – JPSO
S-3 PHOTO LINE UP
STATE AND DEFENSE SUMITT [sic]
THE COURT DENIED MOTION TO SUPPRESS THE ID

MOTION TO SUPPRESS THE EVIDENCE TAKEN UP
STATE SUMITTED [sic] AS TO SEARCH WARRENTS [sic]
THE COURT DENIED MOTION TO SUPPRESS THE EVIDENCE

PENALTY PHASE
DEFENSE MOTION FOR BERNARD NOTICE – DENIED
DEFENSE MOTION FOR JURY QUESTIONNAIRE – DENIED

PRAYER MOTION TAKEN UP
S-W MARY BETH SNYDER
DEFENSE ORAL MOTION TO NOT ASK ABOUT CERTAIN ARREST UNTIL POLICE REPORT IS RECIEVED [sic] – DENIED
PRAYER MOTION CONTINUED TO THURSDAY, JULY 18, 1996 AT 1:30PM
THE DEFENDANT WAS REMANDED TO THE PARISH PRISON

/s/ Becky Loup

ENTRY: 6

[FORM 10] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	07/18/96

DA: JAMES A WILLIAMS COURT REPORTER: KERRY WESTMORELAND

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY GRAHAM DAPONTE, ATTORNEY.

CONTINUATION OF PRAYER MOTION TAKEN UP
S-4 DOCUMENT
S-5 DOCUMENT
DEFENSE ORAL MOTION FOR SECRETATION [sic] OF WITNESSES – GRANTED
S-W DEPUTY DANIEL KILIAN – KENNER POLICE
S-W DEPUTY MATT BONURA – JPSO
S-W DEPUTY VIC GIGLIO – KENNER POLICE
DEFENSE MOTION TO RECALL MARY SNYDER – GRANTED
MOTION CONTINUED TO WEDENSDAY, JULY 24, 1996

THE DEFENDANT WAS REMANDED TO THE PARISH PRISON

/s/ Becky Loup

ENTRY: 7

[FORM 10] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	07/29/96

DA: JAMES A WILLIAMS COURT REPORTER: KERRY WESTMORLAND

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY GRAHAM DAPONTE, ATTORNEY.

CONTINUATION OF PRAYER MOTION TAKEN UP
DEFENSE ORAL MOTION FOR INCENDENT [sic] WHICH OCCURED [sic] ON JUNE 18, 1995 NOT RELEVANT FOR EVIDENCE IN TRIAL – DENIED
THE COURTS RULING ON PRAYER MOTION
INCENDENTS [sic] ONE THRU FIVE ARE GRANTED
INCENDENT [sic] ON NUMBER SIX WILL BE RESERVED RULING
STATE ORAL MOTION FOR DEFENDANT TO BE TESTED FOR SANITY HEARING BEFORE THURS. AUGUST 1, 1996 SO SANITY HEARING COULD BE HEARD AS SOON AS POSSIBLE – GRANTED
SANITY HEARING SET 8-8-96
THE DEFENDANT WAS REMANDED TO PARISH PRISON

/s/ Becky Loup

ENTRY: 8

[FORM 10] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	08/08/96

DA: JAMES A WILLIAMS COURT REPORTER: FAYE CEMO

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY GRAHAM DAPONTE, ATTORNEY.

SANITY HEARING TAKEN UP
S-W DR. DEBRA DEPRATEN – EXPERT OF FORENSIC PSYCHIATRY
S-1 DOCUMENT
STATE AND DEFENSE STIPULATE
STATE AND DEFENSE SUMITTED [sic]
THE COURT FOUND THE DEFENDANT COMPETENT TO STAND TRIAL
THE DEFENDANT WAS REMANDED TO THE PARISH PRISON

/s/ Becky Loup

ENTRY: 9

[FORM 10] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	08/19/96

DA: JAMES A WILLIAMS COURT REPORTER: LINDA LABORDE

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS, DAY. HE/SHE WAS REPRESENTED BY GRAHAM DAPONTE, ATTORNEY.

MOTION FOR RECUSAL TAKEN UP
THE COURT GRANTED A HEARING FOR RECUSAL
JUDGE JO ELLEN GRANT
D-W ANGELA GERRETS
S-W KERNAN HAND
STATE SUMITTED [sic]
THE COURT WILL RESUME TUESDAY, AUGUST 20, 1996 FOR THE RULING
THE DEFENDANT WAS REMANDED TO THE PARISH PRISON

/s/ Becky Loup

ENTRY: 10

[FORM 10] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	08/20/96

DA: JAMES A WILLIAMS COURT REPORTER: LINDA LABORDE

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY GRAHAM DAPONTE, ATTORNEY.

MOTION FOR RECUSAL – DENIED
DEFENSE MOTION FOR CONTINUANCE – DENIED
DEFENSE SECOND MOTION FOR CONTINUANCE – DENIED
DEFENSE THIRD MOTION FOR CONTINUANCE, – DENIED
DEFENSE MOTION IN LIMINE TO PRECLUDE THE STATE FROM NOTORIOUS PROSECUTIONS – DENIED
DEFENSE MOTION IN LIMINE TO PRELUDE THE STATE FROM INTRODUCING PREJUDCIAL [sic] PHOTOGRAPHS 1-AUTOPSY PICTURES – DEFERRED RULING 2-MILITARY PICTURES – DEFERRED RULING
DEFENSE MOTION FOR TESTIMONY ON MILITARY PHOTOGRAPHS – DEFERRED RULING
DEFENSE MOTION TO PRESERVE DEFENDANTS BELONGINGS – GRANTED

DEFENSE MOTION FOR NOTICE OF DEFENSE BASED UPON MENTAL CONDITION, WILL PLEA NOT GUILTY BY REASON OF INSANITY – GRANTED

PENALTY PHASE
DEFENSE MOTION IN LIMINE TO PROHIBIT JURY INSTRUCTION AND ALTERNATIVELY TO DELARE [sic] ARTICLE 905.2 INSTRUCTION UNCONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION AND THE STATE CONSTITUTION – DENIED
DEFENSE MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE JURY INSTRUCTIONS ON THE PARDON POWER OF THE GOVERNOR – DENIED
STATE ORAL MOTION FOR DEFENDANT TO HAVE MENTAL EXAMINATION WITHIN FOURTY EIGHT (48) HOURS – GRANTED
THE COURT ORDERED FOR ALL EXPERT REPORTS TO BE EXCHANGED BY 5:00PM ON THURSDAY, AUGUST 22, 1996
THE DEFENDANT WAS REMANDED TO THE PARISH PRISON

/s/ Becky Loup

ENTRY: 11

24TH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE #:	95-5114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H-14423-95
	DATE:	08/27/96

JUDGE: KERNAN A. HAND

AT THE HOUR OF 9:30 AM, THE COURT TOOK UP THE MATTER, CASE # 95-5114, ENTITLED STATE OF LOUISIANA VERSUS ALLEN SNYDER FOR THE CHARGE OF ONE COUNT OF R.S. 14:30 FIRST DEGREE MURDER.

PRESENT WERE:

JIM WILLIAMS – ASSISTANT DISTRICT ATTORNEY
ALFRED OLINDE – ASSISTANT DISTRICT ATTORNEY
GRAHAM DA PONTE – ATTORNEY FOR THE DEFENDANT
CESAR VAZQUEZ – ATTORNEY FOR THE DEFENDANT
ALLEN SNYDER – DEFENDANT
LINDA LABORDE – COURT REPORTER

THE STATE MADE AN ORAL MOTION TO REQUEST THAT THE COURT WOULD NOT INSTRUCT THE JURY AS TO ARTICLE 905.2, WHICH WAS GRANTED BY THE COURT.

DEFENSE MADE ORAL MOTION TO PROHIBIT THE STATE FROM USING TESTIMONY FROM MULTIPLE INDEPENDENT EXAMINATIONS OF THE DEFENDANT AS TO THE ISSUE OF SANITY, WHICH WAS DENIED BY THE COURT.

DEFENSE MADE ORAL MOTION FOR IN CAMERA TESTIMONY BY THE DEFENSE ATTORNEY, GRAHAM DA PONTE, REGARDING THE DEFENDANT'S ABILITY TO ASSIST COUNSEL, WHICH WAS DENIED BY THE COURT.

DEFENSE MADE ORAL MOTION FOR AN ORDER PROHIBITING THE ATTORNEYS FROM COMMENTING ON THE TRIAL TO THE MEDIA, WHICH WAS DENIED BY THE COURT.

DEFENSE COUNSEL, CESAR VAZQUEZ, MADE AN ORAL MOTION TO CONTINUE, WHICH WAS DENIED BY THE COURT.

AT THE HOUR OF 9:55 AM, JURY SELECTION BEGAN:

THE FOLLOWING PROSPECTIVE JURORS WERE CALLED TO THE BENCH ONE AT A TIME:
#580 – PATRICIA WHITE – EXCUSED BY THE COURT FOR CAUSE
#282 – LOUIS JOHNSON – WAS NOT EXCUSED
#129 – LEONARD DALE – WAS NOT EXCUSED
#361 – BECKY MATTHEWS – EXCUSED BY THE COURT FOR CAUSE
#583 – ANNETTE WILLIAMS – EXCUSED BY THE COURT FOR CAUSE
#417 – THERESA OLSEN – EXCUSED BY THE COURT FOR CAUSE
#437 – CAROL PERKINS – WAS NOT EXCUSED
#154 – ROLANDO DUBOUE – EXCUSED BY THE COURT FOR CAUSE
#150 – JOHN DONNES II – WAS NOT EXCUSED
#313 – CHARLES KOEHL – WAS NOT EXCUSED
#341 – PETER LICALI – WAS NOT EXCUSED

#45 – CYNTHIA BISHOP – EXCUSED BY THE COURT FOR CAUSE
#386 – MICHAEL MITTERNIGHT – EXCUSED BY THE COURT FOR CAUSE
#510 – SANTOSH SHAH – WAS NOT EXCUSED
#495 – FRANCES SARACIONE – WAS NOT EXCUSED
#370 – KELLY MC MURRAY – WAS NOT EXCUSED
#508 – MARTIN SCUDDER – EXCUSED BY THE COURT FOR CAUSE
#551 – MARY TUNSON – EXCUSED BY THE COURT FOR CAUSE
#109 – VICKIE CHAUFFE – EXCUSED BY THE COURT FOR CAUSE
#9 – BYRAN ALLENO – EXCUSED BY THE COURT FOR CAUSE
#129 – LEONARD DALE – EXCUSED BY THE COURT FOR CAUSE
#455 – JESSIKA PREM – WAS NOT EXCUSED
#42 – MONICA BERNARD – EXCUSED BY THE COURT FOR CAUSE
#358 – GURCHARAN MATHARU – EXCUSED BY THE COURT FOR CAUSE
#374 – MADELINE MELANCON – EXCUSED BY THE COURT FOR CAUSE
#416 – JEANETTE OLIVER – EXCUSED BY THE COURT FOR CAUSE
#304 – RONALD E. KING – EXCUSED BY THE COURT FOR CAUSE
#269 – DOROTHY E. ISACKS – WAS NOT EXCUSED
#363 – MICHAEL MAYERS – EXCUSED BY THE COURT FOR CAUSE
#74 – JEFFREY BROOKS – WAS NOT EXCUSED
#80 – RAYMOND BROWN, III – EXCUSED BY THE COURT FOR CAUSE

#88 – BRENDAN BURNS – WAS NOT EXCUSED
#307 – KATHLEEN KLEIN – WAS NOT EXCUSED
#226 – DAWN M. GRAY – WAS NOT EXCUSED
#439 – JOSEPH PERRIER – WAS NOT EXCUSED
#41 – RUSSELL BERGERON, SR – WAS NOT EXCUSED
#389 – BYRON MONTGOMERY – EXCUSED BY THE COURT FOR CAUSE
#384 – MARILYN MILLER – EXCUSED BY THE COURT FOR CAUSE
#118 – GLADYS COLEMAN – EXCUSED BY THE COURT FOR CAUSE
#119 – VERILYN CONERLY – EXCUSED BY THE COURT FOR CAUSE
#538 – ARTHUR TASSIN – EXCUSED BY THE COURT FOR CAUSE
#514 – JAMES SIMONEAUX – WAS NOT EXCUSED
#444 – SUSAN PICKETT – EXCUSED BY THE COURT FOR CAUSE
#431 – PEARLEE PARUN – EXCUSED BY THE COURT FOR CAUSE
#221 – MARGARET GORIS – EXCUSED BY THE COURT FOR CAUSE
#284 – PEARL JOINER – EXCUSED BY THE COURT FOR CAUSE
#407 – TRI MINH NGUYEN – WAS NOT EXCUSED
#275- RICHARD JACOB – WAS NOT EXCUSED
#115 – LENOR CLERK – WAS NOT EXCUSED
#325 – ROLAND LAWS, JR – WAS NOT EXCUSED
#437 – CAROL PERKINS – EXCUSED BY THE COURT FOR CAUSE
#195 – TERRIE GAFFNEY – EXCUSED BY THE COURT FOR CAUSE
#3 – ROBERT ALARIO – EXCUSED BY THE COURT FOR CAUSE

#577 – GEORGE WEBB – EXCUSED BY THE COURT FOR CAUSE
#570 – BRUCE WALKER – EXCUSED BY THE COURT FOR CAUSE
#259 – FRANCES HOFFMAN – EXCUSED BY THE COURT FOR CAUSE
#180 – SHIRLEY FLEMING – WAS NOT EXCUSED
#76 – WILLIE BROOKS – WAS NOT EXCUSED
#478 – REGINA ROGERS – EXCUSED BY THE COURT FOR CAUSE
#493 – MICHAEL SANDERS – WAS NOT EXCUSED
#419 – FAYE ONETO – EXCUSED BY THE COURT FOR CAUSE
#75 – SANDRA BROOKS – EXCUSED BY THE COURT FOR CAUSE
#7 – ALEXANDER OTIS, III – EXCUSED BY THE COURT FOR CAUSE
#433 – DIANNA PENNING – EXCUSED BY THE COURT FOR CAUSE
#505 – FRANCIS SCOTT – EXCUSED BY THE COURT FOR CAUSE
#460 – MARY QUICK – EXCUSED BY THE COURT FOR CAUSE
#569 – AUBRANELL WAITS – WAS NOT EXCUSED

THE FIRST PANEL OF REGULAR VOIR DIRE BEGAN:
#37 – WILLIAM E. BENNETT – *ACCEPTED*
#54 – DOMINICK J. BONDI – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#331 – LYNETTE LEBOURGEOIS – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#74 – JEFFREY BROOKS – *ACCEPTED*
#78 – HARLIN BROWN – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT

#59 – PEGGY BOUDREAUX – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#62 – WILLIAM BOURGEOIS – DEFENSE CHALLENGED FOR CAUSE, DENIED BY THE COURT, DEFENSE OBJECTION NOTED, EXCUSED BY THE DEFENSE – PEREMPTORY
#68 – POLLY BRAUD – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#340 – WILLIAM LEWIS – *ACCEPTED*
#345 – BARBARA LOVELL – EXCUSED BY THE STATE – PEREMPTORY
#88 – BRENDAN BURNS – EXCUSED BY THE DEFENSE – PEREMPTORY
#464 – MARION REMOND – EXCUSED BY THE DEFENSE – PEREMPTORY
#115 – LENOR CLERK – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT

THE SECOND PANEL OF VOIR DIRE BEGAN:
#201 – PATRICIA GARDNER – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT, DEFENSE OBJECTION NOTED
#341 – PETER LICALI – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#366 – MARY LEE MC CLARAN – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#114 – TIMOTHY CHRISTIANSEN – *ACCEPTED*
#57 – MARY BORGES – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT, DEFENSE OBJECTION NOTED
#69 – JEANNE BRAUN – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#407 – TRI MINH NGUYEN – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT, DEFENSE OBJECTION NOTED

#364 – LUMAY MAYEAUX – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#85 – GERALD BUQUET – EXCUSED BY THE DEFENSE – PEREMPTORY
#454 – TERRY POWELL – EXCUSED BY THE STATE – PEREMPTORY
#93 – MARY CULLIGAN – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#146 – SUZANNE DIMAGGIO – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#427 – STANLEY PAPE – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT

THE FOLLOWING ADDITIONAL PROSPECTIVE JURORS WERE CALLED TO REPLACE THE DISMISSAL OF THE JURORS THAT WERE IN THE PREVIOUS PANEL:
#344 – REUBIN LOTTINGER – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#370 – KELLY MC MURRAY – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#507- GREGORY SCOTT – EXCUSED BY THE STATE – PEREMPTORY
#135 – KAREN DAVIS – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#269 – DOROTHY ISACKS – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#275 – RICHARD JACOB – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#13 – JULIE ANGELICO – *ACCEPTED*

AT THE HOUR OF 6:16 PM, THE COURT RECESSED FOR THE DAY AND CONTINUED THIS MATTER AS AN OPEN JURY TRIAL UNTIL AUGUST 28, 1996 AT 9:00 AM.

THE DEFENDANT WAS REMANDED TO THE JEFFERSON PARISH CORRECTIONAL CENTER.

/s/ Becky Loup
DEPUTY CLERK

ENTRY #:

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE #:	95-5114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H-14423-95
	DATE:	08-28-1996

JUDGE: KERNAN A. HAND

AT THE HOUR OF 9:17 AM, THE COURT TOOK UP THE MATTER, CASE # 95-5114, ENTITLED STATE OF LOUISIANA VERSUS ALLEN SNYDER FOR THE CHARGE OF ONE COUNT OF R.S. 14:30 FIRST DEGREE MURDER.

PRESENT WERE:

JIM WILLIAMS – ASSISTANT DISTRICT ATTORNEY
ALFRED OLINDE – ASSISTANT DISTRICT ATTORNEY
GRAHAM DA PONTE – ATTORNEY FOR THE DEFENDANT
CESAR VAZQUEZ – ATTORNEY FOR THE DEFENDANT
ALLEN SNYDER – DEFENDANT
KERRY WESTMORELAND – COURT REPORTER

JURY SELECTION CONTINUES WITH THE THIRD PANEL:
#247 – THOMAS HAWKINS – EXCUSED BY THE STATE – PEREMPTORY
#390 – ROBERT MOORE – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#456 – KAREN PRIMEAUX – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#472 – ANNA RIZZO – *ACCEPTED*
#455 – JESSIKA PREM – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#10 – SHANNON ALVAREZ – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#218 – WILMA GOFF – EXCUSED BY THE STATE – PEREMPTORY
#153 – KATHLEEN DUBOIS – *ACCEPTED*
#495 – FRANCES SARACIONE – *ACCEPTED*
#496 – MICHAEL SAULINO – EXCUSED BY THE DEFENSE – PEREMPTORY
#504 – ELAINE SCOTT – EXCUSED BY THE DEFENSE – PEREMPTORY, STATE OBJECTION NOTED
#510 – SANTOSH SHAH – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#70 – WILSON BREAUX – DEFENSE CHALLENGED FOR CAUSE, DENIED BY THE COURT, DEFENSE OBJECTION NOTED, EXCUSED BY THE DEFENSE – PEREMPTORY

THE FOURTH PANEL OF VOIR DIRE BEGAN:
#2 – WAYNE AFRICH – *ACCEPTED*
#498 – JANICE SAVOIE – *ACCEPTED*
#159 – IRIS DYESS – EXCUSED BY THE DEFENSE – PEREMPTORY
#572 – LORETTA WALKER – EXCUSED BY THE STATE – PEREMPTORY, DEFENSE OBJECTION NOTED

#48 – LAWRENCE BLUM – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#514 – JAMES SIMONEAUX – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#515 – MYRTLE SIMONEAUX – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#591 – DONALD WOLFE – *ACCEPTED*
#254 – DARLENE HERNANDEZ – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#517 – EUGENE SINCENO – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#97 – EDMOND CANTRELLE – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#534 – DENISE STINE – EXCUSED BY THE DEFENSE – PEREMPTORY
#522 – WAYNE SLANEY – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT

AT THIS TIME, SELECTED JUROR JEFFREY BROOKS WAS BACK STRUCK BY THE STATE. EXCUSED BY THE STATE – PEREMPTORY, DEFENSE OBJECTION NOTED.

THE FIFTH PANEL OF VOIR DIRE BEGAN:
#524 – KEVIN SMITH – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#547 – PATRICIA TRAHANT – *ACCEPTED*
#313 – CHARLES KOEHL – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#324 – STEVEN LANG – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#596 – ARTHUR YAEGER – *ACCEPTED*
#462 – ANNA REBER – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#163 – KAREN EDMONS – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT

#204 – JACQUELINE GASPER – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#428 – DEWEY PARKER – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#434 – JOHN PENNY, JR. – *ACCEPTED*
#439 – JOSEPH PERRIER – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#493 – MICHAEL SANDRAS – EXCUSED BY THE DEFENSE – PEREMPTORY
#150 – JOHN DONNES – *ACCEPTED*

AT THIS TIME, SELECTED JUROR JANICE SAVOIE WAS BACK STRUCK BY THE STATE. EXCUSED BY THE STATE – PEREMPTORY.

AT THIS TIME, SELECTED JUROR TIMOTHY CHRISTIANSEN WAS BACK STRUCK BY THE DEFENSE. EXCUSED BY THE DEFENSE – PEREMPTORY.

AT THIS TIME, SELECTED JUROR ANN RIZZO WAS BACK STRUCK BY THE STATE. EXCUSED BY THE STATE – PEREMPTORY.

THE SIXTH PANEL OF VOIR DIRE BEGAN:
#142 – JESSIE DEVILLIER – EXCUSED BY THE STATE – PEREMPTORY
#544 – CHERI TOUCHARD – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT, STATE OBJECTION NOTED
#183 – GERALD FONTAN – *ACCEPTED*
#286 – HERRIC JORDAN – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#108 – MICHAEL CHATELLIER – EXCUSED BY THE DEFENSE – PEREMPTORY

#383 – JENNIFER MILLER – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#400 – JOANN MULVIHILL – EXCUSED BY THE STATE – PEREMPTORY
#458 – ROLAND PROVENSAL – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#569 – AUBRANELL WAITS – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#397 – LLOYD MORVANT – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#325 – ROLAND LAWS – DEFENSE CHALLENGED FOR CAUSE, DENIED BY THE COURT, DEFENSE OBJECTION NOTED – *ACCEPTED*
#291 – JULIE KAISER – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#573 – JOY WAPPLER – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT

AT THIS TIME, SELECTED JUROR JOHN DONNES WAS BACK STRUCK BY THE DEFENSE. EXCUSED BY THE DEFENSE – PEREMPTORY.

THE SEVENTH PANEL OF VOIR DIRE BEGAN:
#127 – HELEN DAIGLE – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#594 – JACQUELINE WOODS – *ACCEPTED – ALTERNATE*
#186 – PAULA FONTI – EXCUSED BY THE DEFENSE – PEREMPTORY
#453 – THEODORE POSNER STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#480 – ELAINE RONQUILLE – *ACCEPTED – ALTERNATE*
#252 – HAROLD HENO – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#537 – MARGARET TARDO – EXCUSED BY THE COURT

#448 – ALBERT POLLARD – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT, DEFENSE OBJECTION NOTED
#18 – EDMOND AUTHEMENT – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#71 – KATHLEEN BRIGNAC – EXCUSED BY THE COURT
#41 – RUSSELL BERGERON – DEFENSE CHALLENGED FOR CAUSE, GRANTED BY THE COURT
#312 – MICHAEL KNIGHT – EXCUSED BY THE COURT
#226 – DAWN GRAY – STATE CHALLENGED FOR CAUSE, GRANTED BY THE COURT

SELECTED JURORS:
#37 – WILLIAM BENNETT
#340 – WILLIAM LEWIS
#13 – JULIE ANGELICO
#153 – KATHLEEN DUBOIS
#495 – FRANCES SARACIONE
#2 – WAYNE AFRICH
#591 – DONALD WOLFE
#547 – PATRICIA TRAHANT
#596 – ARTHUR YAEGER
#434 – JOHN PENNY, JR.
#183 – GERALD FONTAN, JR.
#325 – ROLAND LAWS
#594 – JACQUELINE WOODS – ALTERNATE
#480 – ELAINE RONQUILLE – ALTERNATE

AT THIS TIME, THE STATE MADE ITS OPENING STATEMENT.

THE FOLLOWING WAS TAKEN OUTSIDE OF THE PRESENCE OF THE JURY:
DEFENSE MADE AN ORAL MOTION FOR MISTRIAL, WHICH WAS DENIED BY THE COURT.

DEFENSE COUNSEL MADE ITS OPENING STATEMENT.

STATE WITNESS:
DEP. MICHAEL COOK

STATE EXHIBITS:
S-1 – MAP
S-2 – PHOTO
S-3 – PHOTO

STATE WITNESSES:
DEP. VIC GIGLIO
DEP. MATT BONURA

STATE EXHIBIT:
S-9 – ADMIT FORM FROM EAST JEFF HOSP.
DATED 6-18-195 [sic]

STATE WITNESS:
DEP. DANIEL KILLIAN

STATE EXHIBIT:
S-10 – ADMIT FORM FROM EAST JEFF HOSP.
DATED 6-11-95

AT THE HOUR OF 6:10 PM, THE COURT RECESSED THE MATTER FOR THE DAY AND CONTINUED THIS MATTER AS AN PEN JURY TRIAL UNTIL 08-29-1996 AT 9:00 A.M.

THE DEFENDANT WAS REMANDED TO THE JEFFERSON PARISH CORRECTIONAL CENTER.

/s/ Becky Loup
DEPUTY CLERK

ENTRY #:

24TH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE #: 95-5114
VERSUS	DIVISION "H"
ALLEN SNYDER	COMPLAINT: H-14423-95
	DATE: 8-29-96

JUDGE: KERNAN A. HAND

AT THE HOUR OF 9:35AM THE COURT TOOK UP THE MATTER ENTITLED STATE OF LOUISIANA VS ALLEN SNYDER FOR THE CHARGE OF R.S. 14:30 FIRST DEGREE MURDER

PRESENT WERE:

JIM WILLIAMS – ASSISTANT DISTRICT ATTORNEY
ALFRED OLINDE – ASSISTANT DISTRICT ATTORNEY
GRAHAM DA PONTE – ATTORNEY FOR DEFENDANT
CESAR VAZQUEZ – ATTORNEY FOR DEFENDANT
KERRY WESTMORELAND – COURT REPORTER

STATE WITNESS
DR. SUSAN GARCIA – STATE AND DEFENSE ENTERED INTO A JOINT STIPULATION AS TO THE WITNESS BEING AN EXPERT IN THE FIELD OF FORENSIC PATHOLOGY

STATE EXHIBITS
S-4 PHOTO
S-5 PHOTO
S-6 PHOTO
S-7 PHOTO
S-8 PHOTO

DEFENSE MADE AN ORAL MOTION TO PROHIBIT THE STATE FROM SHOWING THE AUTOPSY PHOTOGRAPHS WHICH WAS DENIED BY THE COURT.

STATE EXHIBITS
S-12 PHOTO
S-13 PHOTO
S-14 PHOTO
S-15 PHOTO
S-16 PHOTO
S-17 PHOTO
S-18 PHOTO
S-11 CORONERS REPORT

STATE WITNESS
MARY SNYDER

THE FOLLOWING WAS TAKEN OUTSIDE THE PRESENCE OF THE JURY PANEL:
WITNESS/JUROR – WILLIAM R. LEWIS

THE DEFENSE MADE A ORAL MOTION FOR MISTRIAL WHICH WAS DENIED BY THE COURT

STATE EXHIBIT
S-20 PHOTO ALBUM

STATE WITNESS
DET. DEBBIE LABIT

STATE EXHIBIT
S-21 MAP
S-23 CASSETTE TAPE
S-22 TRANSCRIPT OF CONFESSION
S-24 PHOTO
S-25 PHOTO

S-26 PHOTO
S-27 PHOTO
S-19 PHOTO

STATE WITNESSES
GWEN WILLIAMS
LT. NORMAN SCHULTZ

STATE EXHIBIT
S-28 SEARCH WARRANT
S-29 SEARCH WARRANT
S-30 PHOTO
S-31 PHOTO
S-32 PHOTO
S-33 PHOTO
S-34 PHOTO
S-35 PHOTO
S-36 PHOTO
S-37 PHOTO
S-38 PHOTO
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S-62 PHOTO
S-63 PHOTO
S-64 PHOTO
S-65 PHOTO
S-66 PHOTO
S-67 RED HANDKERCHIEF
S-68 BLACK PANTS
S-69 WHITE T-SHIRT
S-70 WHITE SOCKS
S-71 WASHCLOTH
S-72 SHIRT
S-73 SHOES

STATE WITNESS
DR. STEPHEN OWEN HARSHNESS – STATE AND DEFENSE ENTERED INTO A JOINT STIPULATION THAT THE WITNESS IS AN EXPERT IN THE FIELD OF GENERAL SURGERY

STATE EXHIBIT
S-74 PROGRESS NOTES FROM EAST JEFF HOSPITAL

STATE WITNESS
HOWARD MOORE

STATE EXHIBIT
S-75 PHOTO IN FRAME

THE STATE REST AT THE HOUR OF 3:25PM

THE DEFENSE REST AT THE HOUR OF 4:15PM

AT THE HOUR OF 5:29PM THE TWELVE JURORS RETIRED TO DELIBERATE

AT THE HOUR OF 6:20PM THE JURY RETURNED WITH A VERDICT. VERDICT RETURNED GUILTY AS CHARGED. SIGNED FOREPERSON WILLIAM BENNETT THE JURY POLLED, VERDICT DECLARED LEGAL, AND ORDERED RECORDED.

THE COURT CONTINUED THIS MATTER FOR THE PENALTY PHASE TO 8-30-96 AT 9:00AM. THE JURY WAS SEQUESTERED.

THE DEFENDANT WAS REMANDED TO THE PARISH PRISON.

/s/ Becky Loup
DEPUTY CLERK

ENTRY #:

24TH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE #: 95-5114
VERSUS	DIVISION "H"
ALLEN SNYDER	COMPLAINT: H-14423-95
	DATE: 8-30-96

JUDGE: KERNAN A. HAND

AT THE HOUR OF 9:35AM THE COURT TOOK UP THE MATTER ENTITLED STATE OF LOUISIANA VS ALLEN

SNYDER FOR THE CHARGE OF R.S. 14:30 FIRST DEGREE MURDER, PENALTY PHASE

PRESENT WERE:

JIM WILLIAMS – ASSISTANT DISTRICT ATTORNEY
ALFRED OLINDE – ASSISTANT DISTRICT ATTORNEY
GRAHAM DA PONTE – ATTORNEY FOR DEFENDANT
CESAR VAZQUEZ – ATTORNEY FOR DEFENDANT
KERRY WESTMORELAND – COURT REPORTER

THE DEFENSE MADE AN ORAL MOTION FOR CONTINUANCE WHICH WAS DENIED BY THE COURT.

DEFENSE EXHIBITS
PROFFER – DR. SALZER'S REPORT

THE STATE OFFERED THE ENTIRE RECORD AND EVIDENCE WHICH WAS ACCEPTED BY THE COURT.

STATE EXHIBITS
S-1 MAP OF AREA
S-2 PHOTO
S-3 PHOTO
S-4 PHOTO
S-5 PHOTO
S-6 PHOTO
S-7 PHOTO
S-8 PHOTO
S-9 ADMIT FORM FROM EAST JEFF HOSPITAL, 6-18-95
S-10 ADMIT FORM FROM EAST JEFF HOSPITAL, 6-11-95
S-11 CORONER'S REPORT
S-12 PHOTO
S-13 PHOTO
S-14 PHOTO

S-15 PHOTO
S-16 PHOTO
S-17 PHOTO
S-18 PHOTO
S-19 PHOTO
S-20 PHOTO ALBUM
S-21 MAP
S-23 CASSETTE TAPE
S-22 TRANSCRIPT OF CONFESSION
S-24 PHOTO
S-25 PHOTO
S-26 PHOTO
S-27 PHOTO
S-28 SEARCH WARRANT
S-29 SEARCH WARRANT
S-30 PHOTO
S-31 PHOTO
S-32 PHOTO
S-33 PHOTO
S-34 PHOTO
S-35 PHOTO
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S-64 PHOTO
S-65 PHOTO
S-66 PHOTO
S-67 RED HANDKERCHIEF
S-68 BLACK PANTS
S-69 WHITE T-SHIRT
S-70 WHITE SOCKS
S-71 WASHCLOTH
S-72 SHIRT
S-73 SHOES
S-74 PROGRESS NOTES FROM EAST JEFF HOSP., 8-16-95
S-75 PHOTO IN FRAME

BOTH THE STATE AND DEFENSE STIPULATE AS TO THE DEFENDANTS PREVIOUS CONVICTIONS.

STATE WITNESSES
DOREENA WILSON
HOWARD MOORE

DEFENSE WITNESSES
BETH DENTON – DEFENSE OFFERED AS AN EXPERT IN THE FIELD OF SOCIAL WORK WHICH WAS GRANTED BY THE COURT. STATE OBJECTION NOTED.

ALLEN J. SMITH
MARIE SNYDER
LEE MURRAY SMITH
SARAH BREAUX
DR. SARAH DELAND – STATE AND DEFENSE STIPULATE AS TO THE WITNESS BEING AS EXPERT IN THE FIELD OF FORENSIC PSYCHOLOGY
WINNIE WALKER

DEFENSE EXHIBIT
D-2 PHOTO

STATE REBUTTAL:
STATE WITNESSES

DR. THOMAS HANNIE JR. – STATE OFFERED WITNESS AS AN EXPERT IN THE FIELD OF CLINICAL PSYCHOLOGY
DR. ROBERT DAVIS – STATE AND DEFENSE STIPULATE AS TO THE WITNESS BEING AS EXPERT IN THE FIELD OF PSYCHOLOGY

DEFENSE EXHIBIT
D-3 COPY OF MARINE RECORD OF DEFENDANT

AT THE HOUR OF 5:30PM THE TWELVE JUROR RETIRED TO DELIBERATE

AT THE HOUR OF 8:00PM THE JURY RETURNED WITH A SENTENCE. SENTENCED TO BE DEATH. SIGNED FOREPERSON WILLIAM BENNETT THE JURY WAS POLLED.

AT THE HOUR OF 8:15PM THE TWELVE JURORS AND THE TWO ALTERNATES WERE DISCHARGED.

THE COURT ORDERED THAT A PSI BE DONE ON THE DEFENDANT. THE SENTENCING IN THIS MATTER IS SET FOR SEPTEMBER 23, 1996.

THE DEFENDANT WAS REMANDED TO THE PARISH PRISON.

/s/ Becky Loup
DEPUTY CLERK

ENTRY #:

[CONTINUANCE] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER: 9505114
VERSUS	DIVISION: H
ALLEN SNYDER	COMPLAINT: H1442395
	DATE: 10/25/96
DA: JAMES A WILLIAMS	COURT REPORTER: KERRY WESTMORELAND

THE DEFENDANT ALLEN SNYDER IN ABSENTIA BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY GRAHAM DAPONTE, ATTORNEY.

THE SENTENCING WAS ORDERED:

CONTINUED AND RE-SET FOR THE 12 DAY OF NOVEMBER, 1996.

THE ACTION WAS TAKEN AT THE REQUEST OF THE DEFENSE ATTORNEY.

THE DEFENDANT WAS REMANDED TO PARISH PRISON.

/s/ Becky Loup
DEPUTY CLERK

ENTRY: 12

[CONTINUANCE] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER: 9505114
VERSUS	DIVISION: H
ALLEN SNYDER	COMPLAINT: H1442395
	DATE: 11/12/96
DA: JAMES A WILLIAMS	COURT REPORTER: KERRY WESTMORELAND

THE DEFENDANT ALLEN SNYDER IN ABSENTIA BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY MARION FARMER, ATTORNEY.

THE SENTNECING [sic] WAS ORDERED:

CONTINUED AND RE-SET FOR THE 04 DAY OF DECEMBER, 1996.

THE ACTION WAS TAKEN AT THE REQUEST OF THE DEFENSE ATTORNEY.

THE DEFENDANT WAS REMANDED TO PARISH PRISON.

/s/ Becky Loup
DEPUTY CLERK

ENTRY: 13

[CONTINUANCE] FAG

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER: 9505114
VERSUS	DIVISION: H
ALLEN SNYDER	COMPLAINT: H1442395
	DATE: 12/04/96
DA: JAMES A WILLIAMS	COURT REPORTER: KERRY WESTMORELAND

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY MARION FARMER, ATTORNEY.

THE SENTENCING WAS ORDERED:

CONTINUED AND RE-SET FOR THE 16 DAY OF JANUARY, 1997.

THE ACTION WAS TAKEN AT THE REQUEST OF THE DEFENSE ATTORNEY.

THE DEFENDANT WAS REMANDED TO PARISH PRISON.

Reasons for Continuance:
MOTION FOR JUDGMENT OF ACQUITTAL AND MOTION FOR NEW TRIAL FILED IN COURT

/s/ Faye [Illegible]
DEPUTY CLERK

ENTRY: 14

[CONTINUANCE] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	01/16/97
DA: JAMES A WILLIAMS	COURT REPORTER: KERRY WESTMORELAND	

THE DEFENDANT ALLEN SNYDER IN ABSENTIA BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY MARION FARMER, ATTORNEY.

THE SENTNECING [sic] WAS ORDERED:

CONTINUED AND RE-SET FOR THE 22 DAY OF JANUARY, 1997.

THE ACTION WAS TAKEN AT THE REQUEST OF THE DEFENSE ATTORNEY.

THE DEFENDANT WAS REMANDED TO PARISH PRISON.

/s/ Becky Loup
DEPUTY CLERK

ENTRY: 15

[CONTINUANCE] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	01/22/97
DA: JAMES A WILLIAMS	COURT REPORTER: KERRY WESTMORELAND	

THE DEFENDANT ALLEN SNYDER IN ABSENTIA BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY MARION FARMER ATTORNEY.

THE STATIS [sic] ON FORMA PAUPERIS WAS ORDERED:

CONTINUED AND RE-SET FOR THE 03 DAY OF FEBRUARY, 1997.

THE ACTION WAS TAKEN AT THE REQUEST OF THE DEFENSE ATTORNEY.

THE DEFENDANT WAS REMANDED TO PARISH PRISON.

/s/ Becky Loup
DEPUTY CLERK

ENTRY: 16

[FORM 10] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	02/28/97
DA: LAURENCE PAUL ALTERMAN	COURT REPORTER:	MARTHA DULEY

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY MARION FARMER – DEF PRESEN[T], ATTORNEY.

DEFENSE MOTION TO PROCEED IN FORMUS PAUPER [sic] – GRANTED

STATIS [sic] SET 4-18-97

THE DEFENDANT WAS REMANDED TO THE PARISH PRISON.

ENTRY: 17

/s/ Becky Loup

[CONTINUANCE] BBL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER: 9505114
VERSUS	DIVISION: H
ALLEN SNYDER	COMPLAINT: H1442395
	DATE: 04/07/97
DA: DONNY ROWAN	COURT REPORTER: KERRY WESTMORELAND

THE DEFENDANT ALLEN SNYDER IN ABSENTIA BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY MARION FARMER, ATTORNEY.

THE STATIS [sic] CONFRENCE [sic] WAS ORDERED:

CONTINUED AND RE-SET FOR THE 20 DAY OF JUNE, 1997.

THE ACTION WAS TAKEN AT THE REQUEST OF THE DEFENSE ATTORNEY.

THE DEFENDANT WAS REMANDED TO PARISH PRISON.

/s/ Becky Loup
Deputy Clerk

ENTRY: 18

[CONTINUANCE] STL

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON – STATE OF LOUISIANA

STATE OF LOUISIANA	CASE NUMBER:	9505114
VERSUS	DIVISION:	H
ALLEN SNYDER	COMPLAINT:	H1442395
	DATE:	06/20/97
DA: DONALD ROWAN, JR.	COURT REPORTER: KERRY WESTMORELAND	

THE DEFENDANT ALLEN SNYDER APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE/SHE WAS REPRESENTED BY MARION FARMER, ATTORNEY.

THE MOTION HEARING WAS ORDERED:

CONTINUED AND RE-SET FOR THE 18 DAY OF JULY ___, 1997.

THE ACTION WAS TAKEN AT THE REQUEST OF THE DEFENSE ATTORNEY.

/s/ Shannon Leonard
Deputy Clerk

ENTRY: 19

STL

STATE OF LOUISIANA, PARISH OF JEFFERSON
24TH JUDICIAL DISTRICT COURT

STATE OF LOUISIANA	CASE NUMBER: 9505114 I
Vs.	DIVISION: H
ALLEN SNYDER	ITEM NUMBER: H1442395
	DATE: 07/18/1997

DEFENDANT: 01 SNYDER, ALLEN B/M 03/21/1962

DISTRICT ATTORNEY ALTERMAN, LAURENCE PAUL
JUDGE KERNAN A. HAND

THE DEFENDANT ATTORNEY, FARMER, MARION

DID NOT APPEAR BEFORE THE BAR OF THE COURT THIS DAY FOR MOTION HEARING

ISSUE ATTACHMENT.

07/18/1997 /s/ Shannon Leonard
Deputy Clerk

24TH JUDICIAL DISTRICT COURT
FOR PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 95-5114 DIVISION "H"

STATE OF LOUISIANA

V.

ALLEN SNYDER

MOTION IN LIMINE TO PRECLUDE THE STATE FROM MAKING REFERENCE OR COMPARISON TO OTHER NOTORIOUS PROSECUTIONS

(Filed Aug. 16, 1996)

COMES NOW, DEFENDANT, by counsel, and moves this Court pursuant to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, §§ 2, 3, 13, 16, and 24 of the Louisiana Constitution to preclude the state from making any reference or comparison whatever – direct or indirect – to other notorious prosecutions, specifically *People of the State of California v. Orenthal James Simpson.*

In support of his motion, defendant states as follows:

1.

Since this is to be a capital prosecution, exacting standards must be met to assure that it is fair. As the Louisiana Supreme Court has held, "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding

difference in the need for reliability in the jury's determination that death is the appropriate punishment in a specific case." *State v. Myles,* 389 So. 2d 12, 30 (La. 1980) (citing cases); *see also Johnson v. Mississippi,* 486 U.S. 578, 584, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988) ("[t]he fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special '"need for reliability in the determination that death is the appropriate punishment"' in any capital case") (quoting, *Gardner v. Florida,* 430 U.S. 349, 363-64, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977) (quoting, *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) (White, J., concurring))).

2.

References of the kind referred to above serve no purpose other than as an attempt to confuse and prejudice the jury. Surveys conducted since the verdicts in the O.J. Simpson trial have shown consistently that a large majority of white Americans believe the not guilty verdicts were wrong; many indicate that the verdicts have undermined their faith in the entire jury system. To play upon these fears and prejudices to what will doubtless be an overwhelmingly – if not all – white jury deciding a case with admitted similarities is an appeal to racism at worst and vigilante justice at best, and as such is specifically precluded by Louisiana law.

WHEREFORE, Defendant prays for an order precluding the State from directly or indirectly making such references and comparisons as are referred to above, and

providing that any attempt to do so will result in a mistrial.

Respectfully submitted,

/s/ Graham da Ponte
GRAHAM DA PONTE
LSBA 17420
Attorney for Defendant
211 Derbigny Street
Gretna, Louisiana 70053
504-538-5275

ORDER

IT IS ORDERED that the State show cause on the ___ day of _____, 199_, why defendant's motion should not be granted.

GRETNA, LOUISIANA, this ___ day of_____, 199_.

_____
JUDGE

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

STATE OF LOUISIANA NUMBER 95-5114

VERSUS

ALLEN SNYDER DIVISION "H"

Proceedings taken in the above numbered and entitled cause before the Honorable Kernan A. Hand, on August 20, 1996.

[Ruling on Motion in Limine to Preclude the State from Making Reference or Comparison to Other Notorious Prosecutions]

* * *

[14] [416]* MS. daPONTE: Thank you, Your Honor. Let's see, Judge, could we move to the motion in limine to preclude the State from making reference or comparison to other notorious prosecutions. Specifically, Your Honor, I'm asking for an order to the District Attorney's Office, and anybody on their behalf and any of their witnesses, to prevent them from referring to this case or making any comparisons of this case with People of the State of California versus Orenthal James Simpson. Mr. Williams has been all over two parishes talking about this is his O.J. Simpson case. And, it's certainly the similarities are

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* Page numbers are given for the original transcription page assigned by the court reporter for each hearing, followed by the record number assigned by the clerk for purposes of appeal to the Louisiana Supreme Court.

obvious, but they're also very prejudicial. Sixty-something percent of all white people in America think that O.J. Simpson got away with murder. We've got a ninety-five percent jury venire that is white. I believe that such comparisons [15] [417] are irrelevant. They are highly prejudicial and I think that they prevent Mr. Snyder from getting a fair trial, and I would ask that they be precluded in this trial.

MR. WILLIAMS: Judge, I don't think that she stated any case which will allow her her relief that she seeks. I mean, what's next? Motions – if this motion is granted, there will be two dozen more motions seeking to keep me from saying a word during the argument. I understand well, what constitutes a mistrial and what is prejudice and what is not. And I would ask the Court to allow me to prosecute my case in whatever way I see fit. And ask the Court to deny this motion because if this is – if this one is granted, the flood gates will open. I will never be able to refer to anything in connection with the argument of any case if the Court allows this motion.

I think it's premature. Now, certainly, I can assure the Court that I'm not going to get up in my opening voir dire and say, "we're here for the Jefferson Parish O.J. Simpson court – case." I have no intentions of doing that. I have no – perhaps in argument, I don't know. I don't know. It might be inappropriate, but I think it's premature. [16] [418] And I can assure this Court I will make no reference to the O.J. Simpson case at any time during the course of the taking of any evidence in this case.

MS. daPONTE: That's – Judge, evidence is not what I'm worried about. I'm certain he's not going to ask

any witnesses, "don't you think this is a whole lot like the O.J. Simpson case?" I'm concerned about Mr. Williams' famous arguments. And I think –

MR. WILLIAMS: Judge, give me a break. I think –

MS. daPONTE: I'm not finished, Your Honor –

MR. WILLIAMS: Trust me, trust me.

MS. daPONTE: Your Honor, I'm still arguing. And I would ask that the Court issue a ruling that Mr. Williams is not to refer to this or to make comparisons in any way with the O.J. Simpson case and that he be held in contempt if he does that.

MR. WILLIAMS: Judge, I ask the court to allow me, as an officer of this Court, to conduct this case in the proper manner, but in the way that I see fit. And, I have given the Court my word that I will not, at any time during the course of the taking of [17] [419] evidence or before the jury in this case, mention the O.J. Simpson case. I just ask the Court not to grant this motion because it – you know, those Loyola Death Penalty people, when they get this, there will be ten thousand of them coming in in the next case which they will represent somebody seeking to keep the prosecutor from talking about his prior record, how long he was a prosecutor, just about any thing other than – anything. So, I have – I give the Court my word that I won't do this. I just ask you not to grant this motion.

MS. daPONTE: Your Honor, this is my entire point. Mr. Williams wants to try every case in the past and

in the future, we're talking about this case. We're not talking about the O.J. Simpson case. We're not talking about other cases that the Loyola Death Penalty Resource Center may get, we're talking about this case. And we ought to try this case, not the O.J. Simpson case, not the next case down the line. This is the case that is before this Court. This is the case that Mr. Williams needs to keep in his mind and in the jury's mind.

THE COURT: Based on Mr. Williams' representations, I'm going to deny your motion.

[18] [420] MS. daPONTE: Thank you, Your Honor.

* * *

24TH JUDICIAL DISTRICT COURT
FOR PARISH OF JEFFERSON

STATE OF LOUISIANA

NO. 95-5114 DIVISION "H"

STATE OF LOUISIANA

V.

ALLEN SNYDER

MOTION FOR AN ORDER PROHIBITING THE ATTORNEYS FROM COMMENTING ON THE TRIAL TO THE MEDIA

(Filed Aug. 20, 1996)

COMES NOW, DEFENDANT, by counsel, and moves this Court pursuant to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, §§ 2, 3, 13, 16, and 24 of the Louisiana Constitution for an order prohibiting the attorneys involved in this trial from commenting on the trial during its pendency. As grounds for his motion, the defendant states as follows:

1.

Defendant's trial is currently scheduled to begin on August 27, 1996.

2.

On August 20, 1996, the Court denied defendant's motion to prohibit the state from comparing this trial to the infamous O.J. Simpson prosecution in California.

3.

On August 26, 1996, the undersigned attorney received a telephone call from an individual identifying himself as a reporter for WDSU-TV, requesting comment on "the O.J. Simpson trial" scheduled to begin the following day in Jefferson Parish.

4.

The reporter went on to confirm that it was the District Attorney's Office which had billed this trial with the by-now infamous moniker, and intimated that it was the reference that made the story newsworthy.

5.

Clearly, the Assistant District Attorneys handling this case seek to use this trial as political fodder for the September 21 election. Such pandering abridges Mr. Snyder's right to a fair trial.

WHEREFORE, defendant prays that this court issue an order prohibiting the attorneys involved in this matter from commenting on it to the media during the proceedings.

Respectfully submitted,

/s/ Graham da Ponte

GRAHAM DA PONTE
LSBA 17420
Attorney for Defendant
211 Derbigny Street
Gretna, Louisiana 70053
504-538-5275

ORDER

IT IS ORDERED that the State show cause on the ___ day of _____, 199_, why defendant's motion should not be granted.

GRETNA, LOUISIANA, this ___ day of _____, 199_.

_____
JUDGE

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

* *

THE STATE OF LOUISIANA

VS.

NO. 95-5114

DIV. "H"

ALLEN SNYDER

* *

Testimony and proceedings taken in the above numbered and entitled cause, in open court on Tuesday, August 27th, 1996, before the Honorable Kernan A. Hand, Judge presiding.

[Ruling on Motion for an Order Prohibiting the Attorneys from Commenting on the Trial to the Media]

* * *

[15] [477] [MS. daPONTE:] And finally, Your Honor, I do have a motion to prohibit the attorneys from commenting on the trial to the media. I'll just submit it on its face, Judge.

MR. WILLIAMS: Well, I'm a big First Amendment guy, Judge, and I don't see that there's any showing made by them that there's going to be any prejudice to – there's been nothing in the newspaper or on television to

date, certainly the jury that hears this case is going to be sequestered, and they're not going to be able to watch television, or at least it's going to be monitored, number one.

And any newspapers or articles that they read are going to be edited for their reading pleasure, so I think seeking to keep me from speaking to the media, which I don't particularly have any inclination to do right now, but I think this is yet another motion that if it's granted, is going to bring about a tidal wave of other motions, trying to limit what I can and cannot do, and I don't think it's relevant in this case.

MS. daPONTE: Judge, if I could respond.

There has been information in the newspaper, the last motion hearing that we [16] [478] – or the Prieur hearing that we had was extensively covered in the newspaper.

I got a call yesterday from a reporter from WDSU asking me if I would care to comment on the second O. J. Simpson case that was scheduled to go to trial in Jefferson Parish today.

What we do know, similarities about this case, or no similarities, what everyone agrees about the O. J. Simpson case, is that it was tried to the media rather than in the courtroom. And I think that it would be an awful shame to allow that to happen in this case just because we're bored during the summer, and we're looking for something titillating.

The jury is going to be sequestered, but they go out of this courtroom, and they go to lunch, and they go out of this courtroom, and they go to their hotels for the night; and for them to see Mr. Williams – they're certainly not going to see me or Mr. Vazquez, but for them to see Mr. Williams facing a bunch of cameras talking about this case is highly prejudicial. I think it's going to give them the impression that the verdict has been decided, that they have nothing to do but sit here and wait until it's all over.

And I would suggest to the court that it is unfair to Mr. Snyder to have him tried in a milieu like that.

[17] [479] MR. WILLIAMS: Judge, I can assure you that I have no intention of speaking with the press while the case in chief in [sic] being tried, I understand that.

And number two, I can't keep those people from following me around, try as I may, they followed me around before, and they'll probably, if there's a big case, continue to follow me around. That doesn't mean I'm going to talk to them.

But as far as during the pendency of the case in chief, I have no intention of talking to the press, that's against office policy.

THE COURT: All right. With that in mind I'm going to go ahead and deny the motion.

MS. daPONTE: Note my objection.

And Judge, I don't know if I noted an objection to the denying of my initial motion, but I note an objection to that as well, Your Honor.

Thank you.

* * *

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO: 95-5114 DIVISION "H"

STATE OF LOUISIANA

VERSUS

ALLEN SNYDER

Testimony and proceedings taken in the above numbered and entitled cause in open court on August 27, 1996, before the Honorable Kernan A. Hand, Judge presiding.

[Voir Dire]

* * *

[20] [482] THE COURT: All right, any other motions?

MR. WILLIAMS: Not by the State, Judge.

MS. daPONTE: None by defense.

THE COURT: All right. Let's bring in the jurors.

(THE JURORS WERE BROUGHT INTO THE COURTROOM)

THE COURT: Some of you may move up here and sit in the jury box. Yeah, up here.

Let me begin by apologizing to everyone. This is one of the largest courtrooms that we have, and so we'll try to handle this as expeditiously as possible, to cause as [21] [483] little inconvenience as possible.

All right. Ladies and gentlemen, this is Division "H" of the Twenty-Fourth Judicial District Court. I am Skip Hand, Judge for this division, and I'd like to take this opportunity to express our appreciation to each of you for your participation in the jury system, which maintains civil and criminal laws.

I apologize for any inconvenience this may cause you, but I assure you that your presence is indeed necessary.

I would like at this time to introduce the court personnel. We have Shea Pertuit and Becky Loup, our clerks. We have Linda LaBorde our court reporter. We have Roy LeBlanc our deputy. And we have Angela Gerrets our law clerk.

The State of Louisiana mandates that potential jurors meet certain requirements.

1) You must be a citizen of the United States and of Louisiana, and have resided in Jefferson Parish for at least one year prior to today.

2) You must be at least eighteen years of age.

3) You must be able to read and write English.

4) You must not be interdicted or incapable of serving because of a mental or physical infirmity.

And 5) You must not be under indictment [22] [484] for a felony, or convicted of a felony for which you have not been pardoned.

If you fail to meet any of these qualifications, please raise your hand at this time.

Do you want to come forward?

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

MR. WILLIAMS: Judge, we have that lady with the little girl right there in the front row, I don't know what we're going to do with that, she brought her little girl with her.

THE COURT: Well, we'll deal with that later.

Hi, how are you?

What is your name?

MS. WHITE: Patricia White.

THE COURT: Patricia.

MR. VAZQUEZ: I'm sorry, what was that, ma'am?

MS. WHITE: Patricia White.

THE COURT: Which one of the requirements do you not meet, ma'am?

MS. WHITE: I can't read nor write.

THE COURT: Okay. All right. We're going to go ahead and excuse her for cause.

[23] [485] MS. WHITE: Thank you.

THE COURT: Thank you.

MS. WHITE: Okay.

THE COURT: You can go downstairs.

MS. WHITE: All right.

(END OF CONFERENCE)

THE COURT: All right, is there anyone else who fails to meet any of these requirements? You all come forward.

Why don't you wait there, sir. We'll handle them one at a time.

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

MR. JOHNSON: Louis Johnson.

I have to be at the doctors for Thursday, and then I've got to be back on September the 8th – 9th at the medical center.

THE COURT: So you have two doctors appointments?

MR. JOHNSON: Yes sir, one Thursday coming, and one next month on the 9th.

THE COURT: What type of condition do they treat you for?

[24] [486] MR. JOHNSON: Well, this one here is for my pressure and my heart, my pressure and my heart.

MR. WILLIAMS: What's your name, sir?

MR. JOHNSON: Louis Johnson.

MR. WILLIAMS: Louis Johnson.

MR. JOHNSON: It's for my pressure and my heart, and fluid pills.

MR. WILLIAMS: I've got no problem with excusing him, but this is not the time to do it now, because if they overhear this, all of them are going to be coming up.

MS. daPONTE: We would object to a challenge for cause at this point, I think maybe there's something that could be worked out.

THE COURT: Okay.

MR. WILLIAMS: Okay, that's fine.

THE COURT: All right. We're not going to excuse you at this point, sir.

(MR. JOHNSON LEFT THE BENCH)

MR. DALE: I'm a diabetic.

THE COURT: [25] [487] I'm sorry?

MR. DALE: I'm a diabetic, and I get woozy.

THE COURT: Oh, okay.

MR. WILLIAMS: What's your name, sir?

MR. DALE: Leonard Dale.

MS. daPONTE: What is it, sir?

MR. DALE: Leonard Dale, Leonard Dale.

MR. WILLIAMS: D-A-L-E, probably.

THE COURT: Do you have to take medications for that?

MR. DALE: Yeah.

THE COURT: Is there anything else you have to do?

MR. DALE: Not too much.

I take pills in the morning, and when I go to bed at night.

THE COURT: Uh huh.

MR. DALE: And I get woozy like, at times, when I get up to move, I've got to have something to hold on to.

[26] [488] THE COURT: That would effect your ability to sit as a juror?

MR. DALE: Well, I've got a bar that I run, and I open it at 10:30 in the morning and close it at 10:30 every night.

THE COURT: Uh huh.

MR. DALE: And I don't have no employees, and I can't afford to –

MR. WILLIAMS: Judge, I think this is for another time.

MR. VAZQUEZ: I agree.

THE COURT: Yes, I think so.

Yeah, okay. Yeah, we're not going to excuse you at this point, sir.

MR. DALE: Thank you.

(MR. DALE LEFT THE BENCH)

MR. VAZQUEZ: You need to repeat that list of three qualifications that I mentioned, that we discussed, right now, maybe you need to repeat that to the audience.

THE COURT: Well, we only have two more people.

MR. VAZQUEZ: No Judge, there's a lot, there's about [27] [489] ten of them.

THE COURT: No, those are just the people who are standing there.

MR. VAZQUEZ: Oh, oh, I'm sorry.

THE COURT: How are you?

MR. WILLIAMS: What's your name, ma'am?

MS. MATHEWS: Becky Mathews.

MR. WILLIAMS: Becky Mathews.

MS. daPONTE: Becky what?

MS. MATHEWS: Right now I'm not emotionally stable to be here. My daughter ran away Sunday, and I'm still dealing with the emotional baggage. I've got four teenage daughters that I have raised myself, and I just can't be here, I've broken down already once, and I just can't stay, because if I do, I'm going to break down again.

THE COURT: Okay.

MR. WILLIAMS: Are you on any medication right now, ma'am?

MS. MATHEWS: No, I'm not. I'm usually a totally [28] [490] controlled person, but I've just been

through too much in the past week, and I can't deal with this right now.

I don't know if that matters or counts.

THE COURT: Okay. I'm going to go ahead and excuse you for cause.

MS. MATHEWS: Thank you.

By the way, you used to have an office across the street from my house on Delaware.

THE COURT: Okay. You may go downstairs.

MS. daPONTE: Just note our objection for the record.

MR. WILLIAMS: They're all getting in line.

THE COURT: All right.

(MS. MATHEWS LEFT THE BENCH)

MR. WILLIAMS: What's your name, ma'am.

MS. WILLIAMS: Annette Williams.

And I have a nerve condition, and I also have a felony charge against me.

THE COURT: A what charge?

MS. WILLIAMS: A felony charge.

THE COURT: Uh huh. Okay.

[29] [491] MS. WILLIAMS: And I also have a nerve condition.

MS. daPONTE: Is it something –

MS. WILLIAMS: I'm on medication.

MS. daPONTE: Was it something you've been convicted of, or something that you're facing at this time?

MS. WILLIAMS: Something that I have been convicted for already?

MR. WILLIAMS: What's that?

MS. WILLIAMS: Well, it was like a fist fight and the man said I had an armed robbery, but it still remains on my record.

MS. daPONTE: You have a conviction for armed robbery?

MS. WILLIAMS: Yeah.

MR. WILLIAMS: Good-bye.

THE COURT: All right. We're going to excuse you.

MS. WILLIAMS: And I have a – okay.

THE COURT: You can go downstairs.

MS. WILLIAMS: [30] [492] I have a very nerve condition.

(MS. WILLIAMS LEFT THE BENCH)

MR. WILLIAMS: What's your name, ma'am?

MS. OLSEN: My name is Teresa Olsen.

MR. WILLIAMS: Teresa Olsen.

MS. OLSEN: I don't have child care this week, my daughter is going to Terrytown Academy, they start

kindergarten on September 3rd. And where she goes to day care is at – they started their kindergarten the 19th, so she stays at work with me this week.

When I called yesterday they told me to write a letter, and they told me I could come talk to you about it. She's here with me.

THE COURT: You have no one else that can watch her?

MS. OLSEN: No. The aunt and uncle that was my back up, she has to do an angiogram, so they can't watch her., So she's at work with me this week, instead of taking vacation.

THE COURT: Okay. All right, I'm going to excuse you.

MS. OLSEN: Would you like to keep this?

THE COURT: [31] [493] No, just give it to them downstairs. All right, that's it.

(MS. OLSEN LEFT THE BENCH)

MS. PERKINS: I won't discount it, but I can't stand to close every door.

THE COURT: I'm sorry?

MS. PERKINS: I have claustrophobia bad. And right now I'm taking ear medicine for my ears, because they're both blocked up and it's making me dizzy. And I can't breath right now.

THE COURT: Would you –

MS. PERKINS: I've been doing good so far, I thought I could make it.

MS. daPONTE: I'm sorry, what's your name?

MS. PERKINS: Carol Perkins.

THE COURT: All right.

MS. daPONTE: Are you being treated for the claustrophobia?

MS. PERKINS: I'm being treated for my ear right now.

THE COURT REPORTER: Request made for Ms. daPonte to speak [32] [494] into the microphone.

MS. daPONTE: All right, for the record I asked Ms. Perkins if she had any – if she was being treated for claustrophobia.

Have you ever been to a therapist before?

MS. PERKINS: No. I'm being treated for an ear infection though, with two ears blocked up, and it's making me dizzy, and it's not helping.

MS. daPONTE: All right. Can you hear?

MS. PERKINS: A little bit, yeah.

MS. daPONTE: Okay.

MS. PERKINS: I can hear you.

MS. daPONTE: Okay.

MS. PERKINS: I'm trying to hold out as long as I can.

MS. daPONTE: Judge, I'm not really prepared to agree to a challenge for cause, I would object to a challenge for cause.

THE COURT: Okay. We can't excuse you now.

MS. PERKINS: If I know that I can get through a door, [33] [495] I'm okay.

MS. daPONTE: You can get through the doors.

THE COURT: Yeah. All right, well let's see how it goes. Have a seat.

(MS. PERKINS LEFT THE BENCH)

(END OF CONFERENCE)

THE COURT: All right, in this case the defendant Allen Snyder is charged with first degree murder. The defendant is seated before the Bar, he is represented by Graham daPonte and Casear Vazquez.

MS. daPONTE: Good morning ladies and gentlemen.

THE COURT: The Assistant District Attorney is James Williams, who is assisted by Alfred Olinde and Walter Floyd.

MR. WILLIAMS: Good morning ladies and gentlemen.

MR. OLINDE: Good morning ladies and gentlemen.

THE COURT: Does anyone here know any of these people?

MR. DUBOUE: I know Mr. Vazquez.

THE COURT: I'm sorry? Come forward, sir.

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

[34] [496] MR. DUBOUE: I know Casear Vazquez.

MR. WILLIAMS: Your name?

MR. DUBOUE: Last name is Duboue, D-U-B-O-U-E, first name is Rolando, R-O-L-A-N-D-O.

THE COURT: Would the fact that you know Mr. Vazquez effect your judgment in this case?

MR. DUBOUE: I don't think so.

THE COURT: Okay. All right. Have a seat.

(END OF CONFERENCE)

MR. DONNES: I've met the D.A. once or twice, I think, over at –

THE COURT: Would the fact that you've met the D.A. effect your judgment?

MR. DONNES: I met him through the District Attorney, Jack Capella.

MS. daPONTE: Could we get everybody's name when –

THE COURT: What is your name, sir? What is your name?

MR. DONNES: Donnes, D-O-N-N-E-S.

THE COURT: [35] [497] First name?

MR. DONNES: John.

THE COURT: John Donnes. Okay.

Would that effect you in any way, can you be a fair juror?

MR. DONNES: Sure can.

THE COURT: Would the fact that you have met the D.A., would that effect you in any way; can you still be a fair juror?

MR. DONNES: I would think so.

THE COURT: Okay. All right, the purpose of this part of the proceeding is to select a jury. The jury must find the facts in this case based upon the evidence presented at trial.

You must truthfully answer the questions which the lawyers and I will ask. These questions solely are for the purpose of helping the lawyers learn about those persons who may be called upon to serve as jurors.

Please do not be offended by the questions, they are simply a means of learning something about prospective jurors.

The lawyers or I may excuse some of you if it is felt that you may not be an appropriate juror for this case. Being [36] [498] excused in no way reflects upon you personally, or upon your ability or integrity.

Because this is a first degree murder case, it is required that the jurors be separated or sequestered. Thus, if selected to serve as a juror, you will be housed at Travel

Lodge Hotel, westbank, and will not be able to go to your home or job until the trial is concluded.

You will not be permitted to make unmonitored communications.

The trial is expected to go into the weekend. Considering the sequestration requirement, we need now to know if there are any prospective jurors who would suffer extreme hardship should they be chosen for this jury.

Okay. We're going to have to have you all line up right over here, and we're going to have to interview you all one by one.

MR. WILLIAMS: Yes, I think the ones who do not – actually the best way to do it, is the ones who don't have a problem, go to the other courtroom and wait. That way we don't have to –

THE COURT: Yeah. All right, those who are not in this line, you are to follow Officer LeBlanc to another courtroom.

Where is Officer LeBlanc at?

[37] [499] MR. WILLIAMS: I think he just went down with some of the other jurors.

MR. OLINDE: Officer Floyd will do that. Walter, why don't you take them.

THE COURT: Okay. Why don't you all go ahead now and go down to Division "G".

When you come forward, please state your name.

All right, let's begin.

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

MR. KOEHL: Charles Koehl, K-O-E-H-L. That's E-H-L, K-O-E-H-L.

I work two and a half jobs. Okay? That's not my problem right now, I've got Jefferson Parish on me to have my yard grated. Okay?

I have the St. Matthews Church to maintain.

But who's going to take care of my animals? Okay? I have dogs that's at the house right now that need to be taken out, you know. I have mice, birds and snakes, so I've got to make a phone call to have somebody take care of all that, you know.

THE COURT: Okay.

MR. WILLIAMS: We can do that.

[38] [500] THE COURT: We can allow you to make a phone call.

MR. KOEHL: Okay.

THE COURT: You know. Okay. We'll –

MR. KOEHL: I mean, you're going to have to write a note for Jefferson Parish, okay, because I've got John Schiro on my case big time.

THE COURT: We can give you a note saying you've been on jury duty. Okay?

MR. KOEHL: Okay.

THE COURT: All right, you need to go down to Division "G".

Could you take him over to Division "G". Next.

(MR. KOEHL LEFT THE BENCH)

MR. LICALI: My name is Peter Licali, L-I-C-A-L-I.

I have no trouble with the sequestration and all that for the jury.

I went to the emergency room Friday with cellulitis in my right ankle, and I'm presently under medication from the doctor. I haven't seen a regular physician yet, I'm supposed to schedule and follow up on that. I'm taking antibiotics and some pain medication for the condition, which would not [39] [501] prevent me from serving as a juror, or effect my judgment in any way, but I can't speak for what would happen three or four days down the line if this course of antibiotics does not do the job. You understand I'm speaking from –

THE COURT: Sure, sure.

MR. LICALI: – from experience that way.

But as far as being a juror, I have no problem with that, or being sequestered or anything.

THE COURT: Okay. Well, let's just see what happens down the line. Okay?

MR. LICALI: Okay.

THE COURT: All right, you need to – let's see, we need to get you over to the –

THE LAW CLERK: Why don't we have them sit on this bench for right now, Judge.

THE COURT: Yeah, why don't you do that, why don't you have a seat on this bench, and then when the police officer comes –

Next.

(MR. LICALI LEFT THE BENCH)

MS. BISHOP: Cynthia Bishop.

[40] [502] On Thursday afternoon at 2:30 my husband is having a shoulder surgery at Lakeside Hospital with Doctor Bender, and I feel like I – I mean, I can serve if something is going to be finished by Thursday, I have no problem with that if it's going to be a short trial.

MR. WILLIAMS: No.

MS. daPONTE: Ms. Bishop, what kind of surgery?

MS. BISHOP: It's a closed manipulation, he's going to have.

MS. daPONTE: How long will he be in the hospital?

MS. BISHOP: He'll probably go home that night.

MS. daPONTE: That night?

MS. BISHOP: Uh huh.

MS. daPONTE: Okay.

MS. BISHOP: Maybe the next morning, it just depends on how well he does.

MS. daPONTE: I'm not inclined to agree to a challenge for cause.

MR. WILLIAMS: There's none before the Court.

[41] [503] MS. daPONTE: Right, that's right.

THE COURT: Okay. At this point in time we can't excuse you for cause. We may excuse you later, but at this point in time we can't. Okay?

MS. BISHOP: Okay.

THE COURT: All right, why don't you have a seat on that bench.

(MS. BISHOP LEFT THE BENCH)

MR. WILLIAMS: I don't think either one of us ought to take a position –

MS. daPONTE: I know, I don't either, I agree with that.

MR. WILLIAMS: – unless somebody – you make the call.

MS. daPONTE: Right.

THE COURT: Okay.

MR. MITTERNIGHT: Mitternight, Michael A..

I've written a letter, because I just got the notice late – I'm the sole owner of a business with six employees, and I'm the only one that can run the business day to [42] [504] day, and sign checks, end of month taxes, and so forth. A day or so is not a problem, but anything prolonged would put me out of business.

THE COURT: Okay. I'm going to go ahead and excuse him for cause.

MR. MITTERNIGHT: It's an air conditioning contractor, and I've got service trucks on the street, but I'm the only one in the office to route the servicemen.

THE COURT: Okay.

MS. daPONTE: No objection.

THE COURT: All right. You need to go down to the jury room.

(MR. MITTERNIGHT LEFT THE BENCH)

THE COURT: Next.

MR. SHAH: I'm Santosh Shah, S-H-A-H.

I just got this notice yesterday, and I'm working on a project that requires me to be involved in the off-shore construction, and that construction is planned for next week, Monday, and if I'm not there, and if I'm gone for five, six days, like, or four or five days, then there's nobody to replace me. And that would be a problem with this [43] [505] project, so. If it's a day or so I don't think it would be a problem.

MS. daPONTE: When does the project start?

MR. SHAH: Monday. This project is ongoing, but the main phase, you know, the construction crew goes out there on Monday. That's – but before that, there are engineering work to be done, and that's what I'm involved with, and I'm bring like – I didn't – last night I learned about this, and I have work in here, people are waiting for me to deliver the work at this point.

MS. daPONTE: And you're an engineer?

MR. SHAH: Yes.

MS. daPONTE: Whoa, I don't think I want to do that, that wasn't a good move.

MR. WILLIAMS: Let me ask you something, sir. If you got stuck on this jury, would that cause you to lose your job?

MR. SHAH: It could impair it. I can't see, I'm not sure about that it could –

MR. WILLIAMS: Would it cost you money?

MR. SHAH: I haven't clarified that. I think it [44] [506] would, because I just heard about me coming to jury duty last night.

MR. WILLIAMS: If you call your people you're doing the report for, and they said that they can get along without you for a few days, would that change your mind?

MR. SHAH: No. If I call them and find out if they can live without me, no, it won't change my mind.

THE COURT: Okay. All right, well we can't excuse you at this time. Okay?

You need to have a seat over there on that bench.

(MR. SHAH LEFT THE BENCH)

THE COURT: All right, next.

MS. SARACIONE: Frances Saracione, S-A-R-A-C-I-O-N-E.

I have a daughter that has epilepsy, and I don't think I could be away all night and not be able to call her.

THE COURT: Okay. If we made provisions so that you could call your daughter?

MS. SARACIONE: That would be all right.

THE COURT: Okay. All right, have a seat over there on that bench.

[45] [507] (MS. SARACIONE LEFT THE BENCH)

THE COURT: Next.

McMURRAY: My name is Kelly McMurray.

I'm presently a court reporting student at Franklin College of court reporting.

I just started working at K & B two weeks ago, and I have a two and a half year old daughter, where I hardly see her now between school and work.

And there – I see no possible way for me, that I would be able to be sequestered. But I would like to be able to stay like on a one day jury trial.

MR. WILLIAMS: Do you have someone at home to take care of the child if you're selected?

MS. McMURRAY: Yes I do, but my husband has three herniated discs in his back, and – from a workman's comp. case in which we're still waiting to see whether he's going to have surgery or not.

THE COURT: Uh huh. But he, in a pinch, can he baby-sit the child?

MS. McMURRAY: Yes, he can, but it's kind of hard for him to handle her and – well, he's unable to work, he's been out of work for almost a year, a year and a half.

[46] [508] THE COURT: Any other questions?

MS. daPONTE: Do you have any neighbors or family that could help you out?

MS. McMURRAY: My family works, and his mom also works.

MS. daPONTE: Your daughter is at home, she's not in day care?

MS. McMURRAY: No, she's not.

MS. daPONTE: Okay.

That's all.

THE COURT: Okay. All right, we may excuse you later, but we can't excuse you at this point. Okay?

So you need to have a seat over there on that bench.

(MS. McMURRAY LEFT THE BENCH)

MR. SCUDDER: My name is Scudder, Martin.

Good morning, Judge.

I have no problem serving on a jury for the next couple of days, but come Thursday I have a long trip to take my daughter up north for her schooling, and of course travel back on Sunday.

THE COURT: Have you already paid for your tickets [47] [509] and all?

MR. SCUDDER: Yes.

THE COURT: All right. We're going to go ahead and excuse you. You need to go downstairs. Get your card.

(MR. SCUDDER LEFT THE BENCH)

THE COURT: All right, next.

MS. TUNSON: My name is Mary Tunson, T-U-N-S-O-N; Tunson, T-U-N-S-O-N, Mary, M-A-R-Y.

Me, I can't serve on a jury because I works, and when I don't go to work every – I'm the head of my house, and when I don't work, I don't get paid. And it's going on the first of the month, and if this trial is gonna last a long time, I be losing every day of work. Nobody helps me, and I have to work.

MS. daPONTE: Where do you work Ms. Tunson?

MS. TUNSON: I do domestic work.

MS. daPONTE: Okay. Who do you work for?

MS. TUNSON: Mr. Schmidt, Mr. Charles Schmidt, S-C-H-M-I-D-T.

MS. daPONTE: Okay.

[48] [510] MS. TUNSON: He's a lawyer.

MS. daPONTE: So he understands about jury service. Do you think that we might be able to talk to him about whether it would be a problem for him?

MS. TUNSON: Well, the thing about it, I don't get paid. That's the problem, that's why I said it would be hard on me.

THE COURT: You work every day for him?

MS. TUNSON: Yeah, I works every day, I do domestic work. And if I don't work, I don't get paid.

MR. WILLIAMS: You're the sole support for the people –

MS. TUNSON: I'm the sole support of my house, right.

MS. daPONTE: How many people in your house?

MS. TUNSON: Huh?

MS. daPONTE: How many people in your house?

MS. TUNSON: I have a son, and my two grandchildren.

MS. daPONTE: How old is your son?

[49] [511] MS. TUNSON: Well, I have a son, he's twenty-two, but he's not working.

Then I have a granddaughter, she's eleven years old, and I have one that's eight. So when I stop, everything stop.

And plus, I don't have transportation, I have to catch a bus to come over here.

MS. daPONTE: If you got sequestered you wouldn't have to do that.

MS. TUNSON: I know, but that's the point I keep saying, I thought it was like a one day, you know, this is hard on me.

MS. daPONTE: Sure.

MS. TUNSON: You know, so I hope you all understand that.

THE COURT: All right, we're going to go ahead and excuse you for cause.

MS. TUNSON: I sure appreciate it.

MS. daPONTE: Note an objection for me on that, please.

MS. TUNSON: Can I leave?

THE COURT: Yeah, you can leave.

[50] [512] MS. TUNSON: Okay.

(MS. TUNSON LEFT THE BENCH)

THE COURT: Next.

MS. CHAUFFE: Vickie Chauffe.

I am separated and I have a twelve year old son at home, alone, so it wouldn't be possible for me not to be there.

THE COURT: Do you have anyone else that could watch the child for you?

MS. CHAUFFE: His father lives in Mandeville. We're in old Metairie, he goes to school in old Metairie. My mother works every day, and my two sisters work every day.

And they're not close enough to, you know, – one lives way out in – by Laplace somewhere, and one lives in Waggamann, so it's not like they're close enough to get him to school or –

MS. daPONTE: Do you have any neighbors that might be able to help you out?

MS. CHAUFFE: I do have a very close friend that lives close, but she doesn't have a vehicle.

MS. daPONTE: I've got to get your name again, I'm sorry?

[51] [513] MS. CHAUFFE: Vickie Chauffe, C-H-A-U-F-F-E.

MS. daPONTE: Thanks, I'm sorry.

And when did you say your child starts school?

MS. CHAUFFE: Oh, he's in school already.

MS. daPONTE: He's in school already.

MS. CHAUFFE: He started last Monday.

MS. daPONTE: Okay. And so the problem is getting him to and from school, and having somebody stay with him?

MS. CHAUFFE: Right, yeah, he's got –

MS. daPONTE: And your ex-husband, although –

MS. CHAUFFE: He lives in Mandeville.

MS. daPONTE: But would he be able to possibly come and stay there and help out?

MS. CHAUFFE: He has a brand new baby, and two other children. And the baby was just born maybe a week and a half ago. I'm not sure of the date.

MR. WILLIAMS: If you got selected on this jury anyway, [52] [514] despite what you're telling us, do you think that you would be able to pay attention to the evidence in the case, and listen to the Judge, and be a good juror? Or do you feel you would be worrying too much and not be able to listen to the evidence?

MS. CHAUFFE: I think I'd be worrying for more than one reason, not just the fact that, you know, I'm worried about my son getting too and from, because of –

MR. WILLIAMS: That's the only thing we're concerned about now.

MS. CHAUFFE: No, I think I'd worry about it too much. I don't think I'd be picked anyway, because I'm a legal secretary.

MR. WILLIAMS: I don't know about that.

MS. CHAUFFE: Well, that was what I was told, so.

THE COURT: All right. We're going to go ahead and excuse you.

MS. CHAUFFE: Thank you.

THE COURT: You have to go get your card right there.

(MS. CHAUFFE LEFT THE BENCH)

THE COURT: [53] [515] All right, next.

MR. ALLENO: Byran Alleno, A-L-L-E-N-O.

I'm a mechanic, I work on commission, if I'm not there to work on the cars, I don't get paid. So missing two or three days of work, it's virtually impossible. My wife does not work, and I do have three kids.

THE COURT: Okay.

MR. WILLIAMS: Do you work on the weekends?

MR. ALLENO: I work on Saturdays, half a day on Saturdays.

MR. WILLIAMS: Okay.

MS. daPONTE: You don't have a partner, you work by yourself?

MR. ALLENO: I'm sorry?

MS. daPONTE: You work totally alone?

MR. ALLENO: I work in a dealership.

MS. daPONTE: Okay. And it's totally –

MR. ALLENO: But I'm the one who builds engines and transmissions in the dealership.

MR. WILLIAMS: [54] [516] What dealership?

MR. ALLENO: Ducote Chrysler.

MR. WILLIAMS: Don't they pay you anyway if you're not there?

MR. ALLENO: No.

MR. WILLIAMS: They don't?

MR. ALLENO: If I don't turn any hours in for a week, I don't get paid for that week.

MR. OLINDE: What if the Judge calls the dealership and says you're stuck here with jury duty, and they can't hold it against you?

MR. ALLENO: If they can't hold it against me, if I can get a pay check, yeah, that's fine.

MS. daPONTE: Some businesses have a jury policy –

MR. ALLENO: There's school time, there's holiday time. There's only seven holidays in a year that I get paid for. And if I'm elected to go to school for a day, I get paid for that day. But if I'm not there to turn in the wrenches, I don't get paid.

MR. WILLIAMS: What about sick time?

MR. ALLENO: [55] [517] No sick time.

MS. daPONTE: No sick time.

And they don't have a jury policy as far as you know?

MR. ALLENO: As far as I know, no, ma'am.

MR. WILLIAMS: I think we could call them and find out.

THE COURT: All right. Let us check it out. We'll call, we'll make a call. Okay?

MR. ALLENO: All right.

THE COURT: Why don't you have a seat over there on the bench.

THE LAW CLERK: Where do you work, sir?

MR. ALLENO: Ducote.

THE LAW CLERK: Which location?

MR. ALLENO: The number is –

THE LAW CLERK: Or the number.

MR. ALLENO: Chrysler. 367-8888.

THE LAW CLERK: Thank you.

MR. ALLENO: [56] [518] Okay.

(MR. ALLENO LEFT THE BENCH)

THE COURT: All right, next.

THE COURT REPORTER: I need his name again.

MR. DALE: Leonard L. Dale.

MS. daPONTE: Dale.

MR. DALE: D-A-L-E.

MS. daPONTE: Same situation, Mr. Dale, is that right?

MR. DALE: I'm a bar owner, I open up at 9:30 in the morning and close at 10:30. I'm the only one, I don't have employees, can't afford 'em.

MS. daPONTE: No employees at all?

MR. DALE: No.

MS. daPONTE: Okay.

MR. WILLIAMS: What if you got picked on the jury and you couldn't open your bar?

MR. DALE: Nope, I couldn't open it, because I can't trust people.

MR. WILLIAMS: [57] [519] I understand that, but would that – if you got stuck as a juror, would you be able to listen to the evidence in the case?

MR. DALE: I'd have to listen.

MR. WILLIAMS: Uh huh.

MR. DALE: But my decision, I can't tell you that.

MR. WILLIAMS: Okay. Is that the only income you have?

MR. DALE: Yeah. I'm a retired railroad man.

MR. WILLIAMS: Okay.

THE COURT: All right, I'm going to go ahead and excuse you for cause. Okay?

MR. DALE: Thank you, Your Honor.

THE COURT: All right, get your card.

Yeah, you have diabetes too?

MR. DALE: Yeah.

(MR. DALE LEFT THE BENCH)

THE COURT: All right, next.

MS. PREM: Jessika Prem.

I'm getting married in four weeks, and I'm doing all my last preparations for my [58] [520] wedding.

My job will only pay me for one day of serving jury duty, and I really can't afford to lose two or three days.

MS. daPONTE: Where do you work?

MS. PREM: Gertrude Gardner.

MS. daPONTE: And when are you getting married?

MS. PREM: September 21st.

THE COURT: If we could call Gertrude Gardner and see if we could get them to pay you for the time you have to serve, –

MS. PREM: I'd have no problem if they can pay me. It would be a little tight because of the wedding, but really my problems are financial.

THE COURT: Okay. Well, let's try to call Gertrude Gardner. Give Angela your phone number at work so she can call and check and see.

(MS. PREM LEFT THE BENCH)

THE COURT: All right, next. When you come forward, please speak into his microphone, because we're recording everything.

Next?

MS. BERNARD: [59] [521] Monica Bernard.

I'm a single parent of a five year old. He starts school Thursday, and I just started work three months ago, I'm new on the job, and I've missed more than one day due to the doctors and registration for my son. And it would really be too much work to miss.

MS. daPONTE: Where do you work?

MS. BERNARD: Southern Electronics Supply.

THE COURT: Do they pay you when you miss work?

MS. BERNARD: No. Do they pay me? No.

THE COURT: For jury duty, do you know if they have a policy?

MS. BERNARD: I'm really not sure, I just started.

MS. daPONTE: Who – your five year old is at school?

MS. BERNARD: Not now. We live with my mom.

MS. daPONTE: Okay. So your mom could –

MS. BERNARD: And she's disabled. But he just stays home.

MS. daPONTE: When does he start school?

[60] [522] MS. BERNARD: Thursday, that's his first day of school. And he's ADHD, he's attention deficit, and it's really hard.

MS. daPONTE: The first day of school is kind of tough.

MS. BERNARD: Yeah, uh huh.

THE COURT: All right, if you were chosen for this jury, regardless of those problems, if you were chosen, could you pay attention and be a fair juror, or do you think these problems would –

MS. BERNARD: It would really be hard, with him having attention deficit disorder, for me to be away from him for five days at a time.

Is that what you mean?

MS. daPONTE: In terms of whether you could concentrate on the trial –

MS. BERNARD: Well knowing him, I mean, he's, you know, hyperactive, and it's hard for me to – knowing that he's with my mom who is disabled.

MS. daPONTE: Okay.

THE COURT: All right, we're going to go ahead and [61] [523] excuse you for cause.

MS. BERNARD: Thank you.

(MS. BERNARD LEFT THE BENCH)

THE COURT: Next.

MR. MATHARU: My name is Gurcharan Matharu.

I work at the nuclear power plant, Waterford III, for Entregy Corporation.

I just got the jury summons yesterday, very short notice.

I'm personally involved in responding to some of the safety issues that the Federal Regulators have raised at the plant, and this would really hurt the responses that I am preparing

MR. WILLIAMS: They've got to work, by all means.

MS. daPONTE: I know. Let me just ask you a couple of questions.

MR. MATHARU: Sure.

MS. daPONTE: Do you work with anybody?

MR. MATHARU: Do I work with anybody?

MS. daPONTE: Is there anybody that works with you in what you do?

MR. MATHARU: [62] [524] Yes, I've got seven engineers working for me.

MS. daPONTE: Okay. And is there anybody that you feel like could do you job for you for a couple of days while you were out?

MR. MATHARU: If I have the opportunity to go and delegate it, it would take me a week to ten days –

MS. daPONTE: Oh.

MR. MATHARU: – to deligate [sic] my responsibilities, and bring the people up to speed on what I've been doing. And then, oh sure, I mean, no body is that important, no one individual is that important.

MS. daPONTE: What would happen if – well, let me just ask you, what exactly – is it confidential? What exactly is it that you're doing that you need to be doing for the next few days?

MR. MATHARU: Well, the nuclear power plant obviously has to be operating in a safe condition. We get federal regulators on a regular basis, looking at the safe operation of the plant, and how, – if and when there is an issue or an accident, or the plant may not be in a safe condition.

[63] [525] MS. daPONTE: Would this condition be – would this condition, that is your inability to serve, would that be present at any time during the year?

MR. MATHARU: Yes, yes.

MS. daPONTE: And if you had to serve, do you think you'd be able to make some kind of arrangements so that you could?

MR. MATHARU: Given the opportunity, and given the time to go and delegate what I have, I could, yes.

MS. daPONTE: And if you find out today you've got to be sequestered for five days, what would happen?

MR. MATHARU: No, I could not be able to do that.

THE COURT: Okay. We're going to excuse you for cause.

MR. MATHARU: All right. Thank you, Judge.

(MR. MATHARU LEFT THE BENCH)

MS. MELANCON: Madeline Melancon.

My husband and I have travel plans, we've made them for the last three months, and they include this weekend, we're leaving [64] [526] Saturday. And if I'm sequestered for the weekend, you know, we'd have to cancel everything.

MS. daPONTE: What kind of plans are they?

MS. MELANCON: We're going to Branson with some other people. And we made our reservations and everything, you know.

MR. WILLIAMS: Yeah.

MR. VAZQUEZ: Madeline Melancon, is that it?

MS. MELANCON: Uh huh.

THE COURT: Yeah, we're going to excuse you.

MS. MELANCON: I can be excused?

THE COURT: Yes. Get your card and go downstairs.

MS. MELANCON: Okay, thank you.

(MS. MELANCON LEFT THE BENCH)

THE COURT: I'm almost thinking, you know, I was trying to figure out how many people didn't fall into this group. We had almost fifty that didn't fall into this group.

MR. WILLIAMS: Right, pretty good.

THE COURT: [65] [527] Yeah, if we – it would be better to proceed, get the other hundred in, and then see if we get fifty out of that, and if we got a hundred all together, you know, we could leave all these other people in another room, instead of going through excuse by excuse. We might be here for a week.

MR. WILLIAMS: Yeah, I agree.

MS. daPONTE: Oh, I see what you're saying.

THE COURT: You know, if we had a hundred, –

MS. daPONTE: No, I'm sorry, Judge, I don't want to do it, because some of these people aren't going to be excused, and I think that I'm entitled to have – Mr.

Snyder is entitled to have some of those people, this is random selection, so I – as much as I'd like to get the trial out of the way, Judge, I would object to just letting these people go.

MR. VAZQUEZ: But you don't have to take long to interview them.

THE COURT: Yeah. Okay, let's proceed.

Come forward.

MS. OLIVER: My name is Jeanette Oliver.

Yes, and my problem is I have a two year [66] [528] old granddaughter that I take care of after I come from work. Her mother and father work and go to school, so I take care of her after I come from work. And I work at a school library, a high school library.

And I'm a diabetic, and I have high blood pressure.

THE COURT: Uh huh.

MS. daPONTE: Ms. Oliver, you have medication that you take for that?

MS. OLIVER: For that, yes, for my blood pressure.

MS. daPONTE: Okay. And you would be able to get that medication and bring that with you if you made a phone call; or do you have it with you?

MS. OLIVER: No, I would have to get it.

MS. daPONTE: Okay. So you could make a phone call for somebody to bring you that?

MS. OLIVER: I guess.

MS. daPONTE: Okay. So you just watch your grand-daughter for a few hours in between your work and the time her parents get home?

MS. OLIVER: Yes.

[67] [529] MS. daPONTE: Do you think if you made a phone call somebody might be able to do that for a couple of days?

MS. OLIVER: I don't know who could do it.

MS. daPONTE: Do you have a neighbor maybe, or do her parents have any brothers and sisters, anybody that –

MS. OLIVER: No, her parents only – well, her mother works out, and she works two jobs, so she's always working. And my son, – well, I just don't know what we'd do, I've been taking care of her all summer.

THE COURT: Is there any kind –

MS. OLIVER: And school just opening, things are really hectic at the beginning of school year in the library, you know.

MS. daPONTE: Uh huh.

MS. OLIVER: I work at Archbishop Chapelle.

THE COURT: You don't think there's anyone else that could watch the child?

MS. OLIVER: I can't think of anyone. We haven't had anyone all summer, there's just no one [68] [530] available that could watch –

THE COURT: Who watches the child during the day?

MS. OLIVER: Oh, she goes out to U.N.O. with my son and her mother, and she stays out there until after school, and then they bring her home and I keep her from like 3:00 o'clock until 10:00, until they get off of work.

THE COURT: She can't stay out with them?

MS. OLIVER: Out at U.N.O.? Oh no, it's only day time sitting at the university.

THE COURT: Oh, okay. All right, we're going to go ahead and excuse you for cause.

MS. OLIVER: Thank you.

(MS. OLIVER LEFT THE BENCH)

MR. KING: Ronald King.

I'm a self-employed mortgage broker, I work on commission only. I just can't afford to be out that long, it would cost me over half a month's pay. And we work our own files. It's unfortunate, that's where I work.

MS. daPONTE: I'm sorry, where do you work?

MR. KING: I'm a mortgage broker.

[69] [531] MS. daPONTE: A mortgage broker.

MR. KING: Yes. And we work on commission, we have our own files, and it could cost me over half of my pay, being out.

MR. WILLIAMS: A half a month's pay for missing about three days?

MR. KING: Yeah, because I work my own files. And when someone applies for a loan, if I don't close, they go somewhere else, I make no money off of those files.

MR. WILLIAMS: What if your files were brought to you while you were here, that you could work on them here?

MR. KING: It's impossible. I have to contact with Tony Zorn (Phonetic) for title searches, and solve title problems and so forth. I mean, it's just – it's really, it's impossible, I can't do it if I'm here full time. I work sixty hours a week just trying to do it there.

MS. daPONTE: You don't work with anybody else; totally by yourself?

MR. KING: I work with – yeah, but we have our own files to monitor, they're not going to work [70] [532] my – everybody is on commission, and it's obvious, you know, they're just not going to work mine before they do theirs.

MS. daPONTE: Could they take yours, the new referrals that came in?

MR. KING: I'm sorry?

MS. daPONTE: As I understand it, you're worried also about new referrals –

MR. KING: Yes.

MS. daPONTE: – as they come in?

MR. KING: As they come in, yeah.

MS. daPONTE: Well, would there be anybody that would be able to take those referrals for you?

MR. KING: I can't guarantee that, ma'am. It's more the files we have working at this point in time. I mean, I've got files with thirty days that I'm trying to clear problems up, and if I don't, I'm going to lose them. It just concerns me, you know, I can't afford that, to be honest with you.

(THERE WAS A DISCUSSION OFF THE RECORD)

THE COURT: All right, we're going to go ahead and excuse you.

[71] [533] MR. KING: I appreciate it. Thank you.

(MR. KING LEFT THE BENCH)

THE COURT: All right, next.

THE LAW CLERK: On Alleno, Chrysler Ducote said that he would get paid for one day only, for an eight hour period and nothing else, because his is strictly a production worker.

And on Jessika Prem, Gertrude Gardner is going to call me back.

THE COURT: Okay. All right, let's excuse –

MR. WILLIAMS: Mr. Alleno.

(MR. ALLENO APPROACHED THE BENCH)

THE COURT: We're going to go ahead and excuse you.

MR. ALLENO: Okay. Thank you.

THE COURT: You need to actually go down to the jury pool room, because they may pick you for another jury.

MR. ALLENO: Okay.

(MR. ALLENO LEFT THE BENCH)

MS. ISACKS: I'm Dorothy Isacks.

I am a school administrator, and the first day of school was yesterday. It is [72] [534] essential that I be there for the next three days to iron out all of the kinks, to handle the records and the files and all the scheduling, besides being at the front desk.

MS. daPONTE: Where are you employed?

MS. ISACKS: I'm at Trinity Episcopal School.

MS. daPONTE: Oh, you are? There's nobody that you work with that could help you out?

MS. ISACKS: I'm the registrar and the assistant to the other school director. I'm pretty needed right now.

MR. WILLIAMS: If you're stuck here through the weekend, would you be docked any pay for that, is that the problem, financial?

MS. ISACKS: No, time. Time is my problem. I don't know about the other, but that wouldn't be an issue for me.

MR. WILLIAMS: Okay.

THE COURT: I can't excuse you for that at this point in time of the proceedings.

MS. ISACKS: Okay.

THE COURT: But you may be excused later. Okay?

[73] [535] MS. ISACKS: Okay.

THE COURT: All right. Have a seat –

MS. ISACKS: I didn't ask the head master to write for me, because the only time I've been called, I was a standby juror, and I was out of here by 11:00 o'clock, so I didn't feel like it was necessary. And I'm a standby juror again.

THE COURT: I understand.

MS. ISACKS: Okay.

THE COURT: Why don't you have a seat over there.

(MS. ISACKS LEFT THE BENCH)

THE COURT: Next.

MR. MAYER: Mayer, Michael.

I'm scheduled to be out of town, I leave tonight for the next few days. We've got money in hotel rooms and all that.

THE COURT: Okay.

MR. MAYER: I mean, I got the notice yesterday, so.

THE COURT: Okay.

(MR. MAYER LEFT THE BENCH)

[74] [536] THE COURT: Next.

MR. JEFFREY BROOKS: My name is Jeffrey Brooks.

I'm a student at Southern University, New Orleans. This is my last semester. My major requires me to student teach, and today I've already missed a half a day. That is part of my – it's required for me to graduate this semester.

MS. daPONTE: Mr. Brooks, if you – how many days would you miss if you were sequestered on this jury? Do you teach every day?

MR. JEFFREY BROOKS: Five days a week.

MS. daPONTE: Five days a week.

MR. JEFFERY BROOKS: And it's 8:30 through 3:00.

MS. daPONTE: If you missed this week, is there any way that you could make it up this semester?

MR. JEFFERY BROOKS: Well, the first two weeks I observe, the remaining I begin teaching, so there is something I'm missing right now that will better me towards my teaching career.

MS. daPONTE: Is there any way that you could make up the observed observation that you're missing today, at another time?

[75] [537] MR. JEFFERY BROOKS: It may be possible, I'm not sure.

MS. daPONTE: Okay. So that –

THE COURT: Is there anyone we could call, like a Dean or anything, that we could speak to?

MR. JEFFERY BROOKS: Actually I spoke to my Dean, Doctor Tillman, who's at the university probably right now.

THE COURT: All right.

MR. JEFFREY BROOKS: Would you like to speak to him?

THE COURT: Yeah.

MR. JEFFREY BROOKS: I don't have his card on me.

THE COURT: Why don't you give Angela his number, give Angela his name and we'll call him and we'll see what we can do.

(MR. JEFFREY BROOKS LEFT THE BENCH)

THE COURT: All right, next.

MR. BROWN: My name is Raymond Brown.

I have four kids, two girls that are seven, a boy that's six, and another boy that's three. One of my seven year olds is a spastic quadriplegic and severely [76] [538] retarded, and I have to move her around at night. I'm responsible for lifting her, she's weighs about forty five pounds, she's incapable of moving herself, and my wife just had abdominal surgery, so she can't lift her.

THE COURT: All right, we're going to excuse you.

(MR. BROWN LEFT THE BENCH)

THE COURT: All right, next.

MR. BURNS: My name is Brendan Burns.

I have two concerns. I have – I'm a single parent of two teenager daughters, and I have no one to watch over them around here.

I have eighty nine year old grandparents that can't really do anything with them.

And secondly, the financial end of it, any extended period of time would be devastating, I would not be paid for it.

MS. daPONTE: What do you do?

MR. BURNS: I manage a landscape maintenance company, doing work for governments, Jefferson Parish for one.

MR. WILLIAMS: What do you consider an extended period of time? We're hoping to finish this by Saturday.

[77] [539] MR. BURNS: As far as work, I could probably – the financial end, I could handle that, but the – my main concern are my daughters.

MS. daPONTE: How old are your daughters?

MR. BURNS: They're fourteen and seventeen.

MS. daPONTE: Okay. Is there any neighbor or anybody that –

MR. BURNS: Nobody in the neighborhood.

MS. daPONTE: – maybe they can stay with, or relatives, anybody that – you're concerned about at night, right?

MR. BURNS: Yes. Yeah, during the day when they're in school, no problem.

MS. daPONTE: Sure.

MR. BURNS: From 2:30 to 7:30 in the morning, I'm concerned.

MS. daPONTE: Sure. Do you – are you can get in touch with any friends or family that might be able to help out? How about school friends of theirs?

MR. BURNS: I've been thinking of that, I'm not [78] [540] coming up with any. There may be somebody out there, but –

MS. daPONTE: If you were able to have some time and make a phone call, you think you might be able to work that part of it out?

MR. BURNS: After they're out of school, I'd have to talk with them and see who to use.

THE COURT: Yeah. Why don't we do this, we can't excuse you at this time, so why don't you be thinking about that during the course of the day, and then we'll go ahead and allow you to make whatever phone calls you need to make, and make whatever arrangements you need to make. Okay?

Why don't you have a seat over there.

(MR. BURNS LEFT THE BENCH)

MS. KLEIN: My name is Kathleen Klein.

I have a sixteen year old that will be left unsupervised. My husband works out of town, and I'm also a nurse, and it's going to create a staffing problem where I work, they're going to have trouble replacing me.

MS. daPONTE: Where do you work?

MS. KLEIN: Walden (Phonetic) Health Care.

MS. daPONTE: Would they be able to solve that [79] [541] staffing problem, you think, if you were to make a phone call?

MS. KLEIN:

Probably.

MS. daPONTE: And your sixteen year old is a boy or a girl?

MS. KLEIN: A boy.

MS. daPONTE: Okay. Anybody that you could have keep an eye on him?

MS. KLEIN: I really hate to – there is, but I really hate to put that burden on anyone, he's a little difficult.

MS. daPONTE: If you had to do it, you think you could? Okay.

THE COURT: What's her first name? What's your first name?

MS. KLEIN: Kathleen.

THE COURT: Okay.

MR. OLINDE: I have no questions.

THE COURT: You can have a seat over there on that bench.

(MS. KLEIN LEFT THE BENCH)

[80] [542] MS. GRAY: Good morning, my name is Dawn Gray.

The only concern I have about this is my two year old child, I'm a single mother. I can ask my mom and dad to watch him, but they're a little old, and I'm kind of worried about that.

THE COURT: Okay. Does your mom and dad watch him sometimes?

MS. GRAY: Sometimes, but not for a long time, just for a little while.

MS. daPONTE: Because it will be over a period of a few days.

MS. GRAY: That's what I'm worried about.

MS. daPONTE: How old are your parents?

MS. GRAY: They're in their fifties.

THE COURT: They must be –

MS. GRAY: My dad's almost sixty.

THE COURT: Of course, I probably couldn't handle a two year old myself.

MS. GRAY: He's a two year old, and he's a little rambunctious.

[81] [543] But that's okay, if I can't, I'm sure they can do it, but it just worries me, because –

MS. daPONTE: Would you be able to concentrate on the trial?

MS. GRAY: Worrying about him?

MS daPONTE: Worrying about him?

MS. GRAY: I can't answer that, I'm not sure, because I am concerned about it.

THE COURT: Well, if you were able to make – to call them and allay those concerns, in the course of the trial, would that help you?

MS. GRAY: It would.

THE COURT: Okay.

MS. GRAY: I mean, I'm sure they would watch him, I would just be a little worried.

And also, he has never been away from me for a long period of time before, too, so I don't know how he would handle that, you know.

THE COURT: Okay. We'll have to cross that bridge when we come to it.

MS. GRAY: [82] [544] Okay.

(MS. GRAY LEFT THE BENCH)

MR. PERRIER: My name is Joe Perrier.

I have a – I'm a single parent with a fourteen year old daughter and a seventeen year old son. I could probably make arrangements for my son with his mother if it becomes necessary, but my daughter's mother lives in Lafayette. And this weekend, in fact, is her visitation, and we normally meet in Baton Rouge to exchange, or, you know.

THE COURT: Yeah. Is there anybody else that could handle that for you?

MR. PERRIER: I would have to call around and see, you know, to make arrangements for school and all that stuff.

THE COURT: All right, why don't we do this. We'll allow you to, you know, make whatever calls you can make.

MR. PERRIER: Okay.

THE COURT: And see what you can arrange, and then we'll – later we're going to get back to everybody. Okay?

MR. PERRIER: Uh huh.

[83] [545] THE COURT: So see what you can arrange for now, and then, you know, later we'll get an opportunity to –

MR. PERRIER: Okay. Thank you.

(MR. PERRIER LEFT THE BENCH)

MR. BERGERON: Good morning. My name is Russell Bergeron.

And I was wondering, this being a murder trial, whether this trial would go into the late hours, because I can't drive at night, and –

THE COURT: No, you won't be – you would be sequestered, you wouldn't have to drive.

MR. BERGERON: And another thing is, my wife is by herself at the house, and she can't drive. And if this thing goes into next week, next Tuesday is our World War II reunion.

MS. daPONTE: Oh, no.

THE COURT: Oh no, we're not going to go that far, we're not going that long.

MR. WILLIAMS: It should be over by Saturday.

MR. BERGERON: Okay, sir. I've already sent all my money, I don't want to lose –

[84] [546] THE COURT: No, no.

MR. BERGERON: – I don't want to lose my money and everything.

MS. daPONTE: Mr. Bergeron, if your wife was home alone, would you be able to have somebody check on her?

MR. BERGERON: Well, I could ask the next door neighbor.

MS. daPONTE: Would you feel comfortable with that, would you be too concerned to pay attention to the trial, or do you think you would be comfortable with somebody looking in on her?

MR. BERGERON: I guess so.

THE COURT: All right. Why don't you have a seat over there.

Next.

(MR. BERGERON LEFT THE BENCH)

MR. MONTGOMERY: My name is Byron Montgomery.

I work for the local Pepsi Cola Bottling, I manage a big department, and with the holidays coming in, you know, I'll be working all the way through the weekend, just trying to get by this weekend.

One of the guys who runs a big area [85] [547] under me, I was just notified his sister is getting ready to die, so he's going to be out for the next five days.

MS. daPONTE: Is there one – there's nobody else?

MR. MONTGOMERY: Not really, it's a big department.

You've got to be on hand, I mean, each morning you dispatch over fifty people.

MS. daPONTE: You would lose money if you didn't work? Yes?

MR. MONTGOMERY: Yes, a great deal. More importantly, operationally, we'd have serious problems operationally.

MS. daPONTE: Okay.

THE COURT: Okay, we're going to excuse you for cause.

We'll make sure everybody gets their Pepsi for the holidays.

(MR. MONTGOMERY LEFT THE BENCH)

MS. MILLER: Good morning. My name is Marilyn Miller.

I'm a single parent, and I'm just returning back to work from breast, and hysterectomy, and my parents live in Metairie; I live over here. My daughter has to go back and forth to school. I mean, I [86] [548] could do one day, but I don't think that I'd be able to be sequestered to stay overnight, or whatever for so many days, or whatever.

MS. daPONTE: Let me ask you something. You are just returning to work, you missed a lot of work?

MS. MILLER: Well, I don't have a lot of sick leave, it used up a lot of it.

MS. daPONTE: And would you be paid for your jury service or not, you'd have to use more sick time?

MS. MILLER: I don't have a lot of sick leave built up, but I have like maybe two days that, you know, that – my annual leave, we have what they call PDO days, but it's not a whole lot, because I have to used some before I left, I had used three days before I left to go to have major surgery. So, I mean, I could do a day, but, you know, –

MS. daPONTE: This won't be a day.

Give us some background about your child care?

MS. MILLER: The transportation to get my daughter back and forth to school. Well, like I said, we live over here, but my parents live out in Metairie, and it would be kind of difficult for them to try to, you know – if [87] [549] I had to, you know, to do it, it would be hard for her to get back and forth.

MS. daPONTE: Anybody that she goes to school with, that lives near you, that could maybe give her a ride?

MS. MILLER: We could maybe make arrangements or something like that.

MS. daPONTE: If you were given the opportunity to make some arrangements, do you think that you might be able to work it out with your child?

MS. MILLER: Probably so. The only thing is just the leave, I don't think I have –

MS. daPONTE: And that was my next questions.

MS. MILLER: Yeah, I don't have a whole lot of annual leave. The sick leave was just zapped up with the taking off the six weeks.

MS. daPONTE: Where do you work?

MS. MILLER: At East Jefferson Hospital.

MS. daPONTE: Do they have a jury policy where they give you extra time to sit on a jury?

MS. MILLER: I don't know that. I know they told us [88] [550] we could take today – I could take today to come, but I don't know about extra.

THE COURT: Let us contact the hospital, maybe we could find out if they have some type of policy. Okay?

MS. MILLER: Okay.

THE COURT: Why don't you give Angela your number – the number of where you work at.

(MS. MILLER LEFT THE BENCH)

THE LAW CLERK: On Jessika Prem – Graham, on Jessika Prem, Gertrude Gardner will pay her the difference between what she gets paid through the court system, and what her salary is.

MR. WILLIAMS: The courts don't pay –

THE COURT: They'll pay her?

THE LAW CLERK: And they'll pay her for up to thirty days.

THE COURT: All right.

MS. daPONTE: Then we've got the wedding problems. Okay.

THE LAW CLERK: And then Jeffrey Brooks –

[89] [551] MR. WILLIAMS: Ms. Prem, just Ms. Prem.

(MS. PREM APPROACHED THE BENCH)

MR. WILLIAMS: They're going to pay you, good news. You work for a generous employer.

MS. daPONTE: And we'll get back to you on your wedding, we'll have some questions for you about whether you're going to be able to concentrate, –

MS. PREM: Okay.

MS. daPONTE: – because of the stuff to do.

MS. PREM: Okay.

MS. daPONTE: Thanks.

(MS. PREM LEFT THE BENCH)

THE LAW CLERK: Jeffrey Brooks, the requirement for his teaching is a three hundred clock hour observation. Doctor Tillman at Southern University said that as long as it's just this week, he doesn't see that it would cause a problem with Mr. Brooks completing his observation time within this semester.

(MR. BROOKS APPROACHED THE BENCH)

THE COURT: We talked to Doctor Tillman and he says he doesn't see a problem as long as it's [90] [552] just this week, you know, he'll work with you on it. Okay?

MR. JEFFERY BROOKS: Okay.

(MR. JEFFREY BROOKS LEFT THE BENCH)

THE COURT: All right, next.

MS. COLEMAN: Gladys Coleman.

And I don't think I could do it, because I get so weak and dizzy.

THE COURT: Do you have a medical condition that causes it?

MS. COLEMAN: I'm a diabetic, and I get so nervous a lot.

THE COURT: Are you under any kind of medication?

MS. COLEMAN: Insulin, and I takes two other kind of medicines, two other kind of pills.

MS. daPONTE: Do you have that medication with you?

MS. COLEMAN: No ma'am, I didn't bring nothing.

MS. daPONTE: Okay. If you were able to get that medication, and you knew you had it with you, would that make you feel somewhat better?

MS. COLEMAN: [91] [553] I still would be nervous. Because you see, I had a son that was in jail, and he died in jail.

MR. WILLIAMS: This is about the death penalty too, ma'am, you're going to see gruesome photos, and hear about murder. That's going to make you nervous?

MS. COLEMAN: It's going to make me more and more nervous.

MR. WILLIAMS: No other questions?

MS. daPONTE: I don't have any questions, no.

That's all I have, I don't have any other questions.

MS. COLEMAN: Okay.

THE COURT: Is there anything we could do for you to help you with that nervous problem, I mean –

MS. COLEMAN: I take the medicine, but nervousness with this kind of stuff, I don't think I could handle that. I don't think I could be in court with nothing like that.

MS. daPONTE: We have a whole staff of people that you could call on if you felt nervous at any time. Do you think that –

[92] [554] MS. COLEMAN: I'm just scared.

MS. daPONTE: Uh huh. Do you think that – let me ask it to you this way. Do you think that you could be – if you did end up having to serve, do you think you could be fair?

MS. COLEMAN: No.

MS. daPONTE: You don't think so? You don't think you could listen to both sides?

MS. COLEMAN: I don't think I would be able to think about that, knowing that my child had been in jail and he died in jail too.

THE COURT: Okay. We're going to go ahead and excuse you for cause.

(MS. COLEMAN LEFT THE BENCH)

THE COURT: Next.

MS. daPONTE: Objection to that.

MS. CONERLY: Good morning, my name is Verilyn Conerly.

I have four kids. My job won't pay me the time for jury duty, and I am – the I.R.S. is garnishing my check.

MS. daPONTE: What do you do, Ms. Conerly?

[93] [555] MS. CONERLY: Sales clerk.

MS. daPONTE: Where?

MS. CONERLY: At Wal-Mart.

MS. daPONTE: Wal-Mart doesn't – you've already checked, they don't have a jury policy?

MS. CONERLY: No.

MR. WILLIAMS: That would work a hardship on you if you weren't paid for say three days?

MS. CONERLY: Yes, uh huh.

MR. WILLIAMS: All right.

THE COURT: I'm going to go ahead and excuse you. Get your card and go down to the jury room.

(MS. CONERLY LEFT THE BENCH)

THE COURT: Next.

MR. TASSIN: I'm Arthur Tassin.

I'm a truck driver, I drive for Dynasty, and I'm a wench truck driver, and I want to be excused because I'm the only driver they have. They had two, one had a heart attack, and he's off now, and I'm the only one they've got.

[94] [556] They've got some trucks to load, and we, go out of state. I don't know when well get back. All these off-shore buildings for these oil fields and things.

THE COURT: Does your company have a jury policy where you're paid –

MR. TASSIN: No sir, I work on a percentage. We haven't been doing anything the last month. Since the weather was bad, they wasn't moving any buildings, and now we've got some to move tomorrow, going into Cameron.

MS. daPONTE: What is your name, sir, I'm sorry?

MR. TASSIN: Ma'am?

MS. daPONTE: What is your last name?

MR. WILLIAMS: Tassin.

MR. TASSIN: Tassin.

THE COURT: All right, we're going to go ahead and excuse you.

MR. TASSIN: Okay, sir. Thank you.

(MR. TASSIN LEFT THE BENCH)

THE COURT: Next.

MR. SIMONEAUX: [95] [557] James Simoneaux.

I've served on a murder trial two years ago, and it lasted five days, but we were not sequestered.

But I do suffer from emphysema, and if I do get a – if we're sequestered and I get one of those attacks at night, somebody better be around to rush me to the hospital. That's the only problem.

THE COURT: All right. Do you take medication for that?

MR. SIMONEAUX: I have the pump –

THE COURT: Yeah.

MR. SIMONEAUX: – I use three or four times a week when I get a little mild one, you know.

THE COURT: Well this hotel would be on the westbank right by West Jefferson Hospital.

MR. SIMONEAUX: As long as somebody is around to rush me to the emergency room if I get an attack.

THE COURT: Sure.

MR. SIMONEAUX: That's all I'm concerned about.

MR. WILLIAMS: They've got a deputy that's going to be there with you.

[96] [558] THE COURT: A deputy will be there that can take you.

MR. SIMONEAUX: Okay. No problem.

THE COURT: All right. Why don't you have a seat over there.

(MR. SIMONEAUX LEFT THE BENCH)

THE COURT: Next?

MS. PICKETT: My name is Susan Pickett.

I have a school age child, my husband just went back to work after three months of unemployment, and he works shift work.

I'm a secretary, and I'm not sure about – I know I get paid for today, but I'm not sure how long I would get paid.

And since he was unemployed for three months, we're having a financial hardship right now.

MR. WILLIAMS: What if you're selected on this jury, we're hoping to finish by the early weekend, by Saturday, and if you were selected on the jury, would you be unable to focus and pay attention on the case, and worry about what's going on?

MS. PICKETT: Probably because of my son being home alone.

[97] [559] MR. WILLIAMS: How old is your son?

MS. PICKETT: He's in eighth grade.

THE COURT: Do you have anybody else that could watch your son?

MS. PICKETT: Well, my stepmother just had cancer surgery, so she can't. And my mother in law is ill, she has Lupus. So there really isn't anybody else. I mean, I've always been home, I haven't worried about – at night I have been, he does got [sic] to school during the day, naturally, he comes home by himself and calls me when he gets home in the afternoon. And I'm home every day by 5:45, 6:00 o'clock.

THE COURT: How old is your son?

MS. PICKETT: Thirteen. My husband just went back to work, he's working at a car dealership, so his hours are very erratic. He went back to work on the 19th.

THE COURT: What time does he get off work?

MS. PICKETT: He never knows. You know, it's erratic because of the nature of the business, I suppose. We're just getting – we're new to this, he was never in sales before, and he [98] [560] does work on Saturdays also.

MS. daPONTE: Ma'am, what did you say your job was, I'm sorry?

MS. PICKETT: I know I get paid for one day. Really, I'm not sure, I don't know.

THE COURT: Maybe we could call your employer and check it out.

MS. PICKETT: That's fine. Like I said, I don't know.

THE COURT: Why don't you give Angela the number – the name and number, and she can call.

(MS. PICKETT LEFT THE BENCH)

MS. PARUN: Pearlee Parun.

I have plans to go out of town tomorrow to visit my brother that has cancer, and the plane, you know, I made reservations and everything.

THE COURT: We're going to excuse you.

(MS. PARUN LEFT THE BENCH)

THE COURT: Next.

MS. GORIS: Margaret Goris.

I have two reasons that I feel are critical to me. I have a family, I have a three year old child and a twelve year old [99] [561] child. And I'm also a senior officer at Whitney National Bank.

I've got a meeting scheduled tomorrow where I have people coming in from out of town, and I'm chairing the meeting, and I've got three meetings on Thursday that I have to participate in as the senior officer of the bank.

And I feel like I'm not going to be able to be concentrating on the facts of the case if I'm worried about those two things.

THE COURT: Graham?

MS. daPONTE: I don't have any questions.

THE COURT: Okay. We're going to go ahead and excuse you.

(MS. GORIS LEFT THE BENCH)

THE COURT: Next.

MS. JOINER: My name is Pearl M. Ann Joiner, I think is how they have it.

And I have a husband that's on disability, he has bad lungs, and he has to have breathing treatments three to four times a day, and a bad back. And I'm the only one, you know, that can care for him.

And then we just had to put his mother in West Jefferson with an irregular heart beat, and they may have to do surgery on her [100] [562] in the next, you know, day or so, because they've shocked the heart and it hasn't gone back, or something like that they said. So we don't know exactly, in the next couple of days, if they're going to have to do heart surgery on her or what.

And I just don't know if I could, you know, how I'd manage, being –

MR. WILLIAMS: No objection.

MS. JOINER: – in something like this.

MS. daPONTE: Tell me your last name again?

MS. JOINER: Beg your pardon?

MS. daPONTE: What's your last name?

MS. JOINER: Joiner, J-O-I-N-E-R.

MS. daPONTE: Thanks.

THE COURT: All right, we're going to go ahead and excuse you.

Get your card.

MS. JOINER: Thank you. Because I can do it for the day, but I just didn't know about the whole time.

THE COURT: Okay.

[101] [563] (MS. JOINER LEFT THE BENCH)

THE COURT: All right, next.

MR. NGUYEN: My name is Tri Minh Nguyen.

I work for West Jefferson Medical Center. I'm scheduled to work on Wednesday, tomorrow, Friday, Saturday, Sunday, Monday, and my birthday is on this week, Thursday.

And I have a wife who is very paranoid if I'm not there with her. You know, she gets furious, she gets scared and jealous, and so I'm kind of scared, scared that she's gonna cry a little, since she's from Philippines, and she doesn't have any family here. So, I'm the only one with her, so.

MS. daPONTE: Tell us about your work situation? You're scheduled to work all this week, and into next week?

MR. NGUYEN: Well, I'm off Thursday, which is my birthday, yeah. I'm scheduled to work all this week.

MS. daPONTE: Do you get paid if you don't work?

MR. NGUYEN: Do I get paid if I don't work? I think I get paid.

MS. daPONTE: Okay. Now, if your wife knew that you were going to be sequestered, –

[102] [564] MR. NGUYEN: She's going to be furious, and she's going to be scared, and crying.

MS. daPONTE: Is there anyone that you have that could go check on her?

MR. NGUYEN: No, I don't think so.

MS. daPONTE: I know there's nobody that can make you feel any better about when you get home, but if somebody could go check on her and see how she's doing, –

MR. NGUYEN: No. I'm telling you, that's why – even if I go play tennis, she check on me, I'm scared.

MR. WILLIAMS: Sounds like this case.

MS. daPONTE: I'm going to object to that, Judge.

MR. WILLIAMS: I'm sorry.

MS. daPONTE: I'm going to put an objection on the record.

MR. WILLIAMS: So the bottom line is, sir, that if you got picked as a juror, you'd be worried out of your mind about your wife, instead of listening to the evidence, is that true?

MR. NGUYEN: [103] [565] Yeah, I'm worried about my wife, I worry about her.

MS. daPONTE: If you were able to make some phone calls to –

MR. NGUYEN: Trust me, I tried, I tried to explain it to her, but it's not a good idea.

THE COURT: Well, I can't excuse you for that. Okay? So if you'd have a seat over there.

(MR. NGUYEN LEFT THE BENCH)

THE COURT: All right, next.

MR. JACOB: Richard Jacob.

MS. daPONTE: Jacob?

MR. JACOB: The reason I'd like to be excused, I've had open heart surgery in the last five months, and I'm on medication, and I have to – it requires me to go to the bathroom quite frequently, and I need to get up and walk as well, frequently, so that's the reason I'm asking –

MS. daPONTE: How long are you able to sit at a time?

MR. JACOB: It depends, forty five minutes, –

MS. daPONTE: Okay.

[104] [566] MR. JACOB: – sometimes less.

MR. WILLIAMS: If you have the opportunity to move around and use the bathroom, –

MR. JACOB: Yeah, if I can use the bathroom and move around and exercise, you know, – the only thing, I have to move, or my leg swells, and I've got to get up and move sometimes. It's an uncomfortable feeling, believe me.

THE COURT: All right, –

MS. daPONTE: Do you have your medication with you?

MR. JACOB: Yeah.

THE COURT: Let's see if we can work something out for you. Okay? Why don't you have a seat over there.

(MR. JACOB LEFT THE BENCH)

MS. CLERK: My name is Lenor Clerk.

I have seven kids, and at this present time my nine year old is on antibiotics, and my husband gets off at 9:30 at night, and he's taking the medication every eight hours.

MR. WILLIAMS: You work for the Sheriff's Office ma'am?

MS. CLERK: [105] [567] Yes.

MR. WILLIAMS: What do you do?

MS. CLERK: Crossing guard.

MR. WILLIAMS: That's crossing guard?

MS. CLERK: Crossing guard, yes.

THE COURT: What do you do for the Sheriff's Office?

MS. CLERK: Crossing guard.

MR. WILLIAMS: A crossing guard.

THE COURT: Okay.

MS. daPONTE: You have a nine year old that's on antibiotics?

MS. CLERK: Yes, ma'am.

MS. daPONTE: Is somebody – do you think you could find somebody that would stay with your kids? Do you have somebody else at home?

MS. CLERK: Well, my daughter, she can watch him. But as far as the medication, –

MS. daPONTE: How old is your daughter?

MS. CLERK: [106] [568] She's seventeen.

MS. daPONTE: Okay. Do you think if you were able to call your daughter and give an exact schedule every time your nine year old needed the antibiotics, that your daughter would be able to handle that?

MS. CLERK: Yes, she could.

MS. daPONTE: Okay. So you think if the Judge gave you an opportunity to work this out, you think you could work it out?

MS. CLERK: Okay.

MS. daPONTE: Okay.

THE COURT: All right, why don't you have a seat over there.

Next.

MR. LAWS: My name is Roland Laws.

I'm a self-employed general contractor. I have two houses that are nearing completion, one is moving in this weekend, the other next weekend.

And my wife just had a hysterectomy, so I'm running the kids back and forth to school, and we're not originally from here, so I have no family in the area, so between the two things, it's kind of bad timing for [107] [569] me.

MR. WILLIAMS: If you got stuck on jury duty anyway for about three or four days, til the end of the week, do you think that you – it would cause you such concern that you wouldn't be able to listen to the evidence in the case, or would you try to make other arrangements as best you could?

MR. LAWS: I'd have to make other arrangements as best I could.

MR. WILLIAMS: Okay.

MS. daPONTE: What about your work, is it – what happens if you miss this much work?

MR. LAWS: It just gets delayed and the people won't move in, I guess, is what –

MS. daPONTE: You're still going to get paid for the work?

MR. LAWS: Am I? Sure.

MS. daPONTE: Okay.

THE COURT: All right. Well, I can't excuse you at this time.

MR. LAWS: Okay.

[108] [570] THE COURT: Just have a seat right over there.

All right, next.

MS. PERKINS: I hated to come up here. Carol Perkins.

MS. daPONTE: Ms. Perkins, how are you feeling now?

MS. PERKINS: I'm feeling good, I'm doing good.

I have to pick up my husband on Friday, every other week I have to pick him up. I could serve jury, but I don't think I could serve this weekend, up til the weekend.

MS. daPONTE: Where do you pick him up from?

MS. PERKINS: From Lafitte, all the way to New Orleans.

MS. daPONTE: Say that again?

MS. PERKINS: I live in Lafitte, –

MS. daPONTE: You live in Lafitte and you go to New Orleans to pick him up.

MS. PERKINS: – to New Orleans and pick him up, you know, no special time I pick him up, he calls me.

MS. daPONTE: And you take him back to Lafitte with you for the weekend?

[109] [571] MS. PERKINS: Back to Lafitte. No, for the week.

MS. daPONTE: Oh, so you pick him up on Friday. Okay. Would somebody else be able to pick him up?

MS. PERKINS: No.

MS. daPONTE: What would happen if he didn't get picked up?

MS. PERKINS: Maybe a divorce.

MS. daPONTE: Where are you picking him up from?

MS. PERKINS: Uh, let's see, right around Audubon Park.

MS. daPONTE: But I mean, is it from his work?

MS. PERKINS: Yeah.

MS. daPONTE: Okay. And if – could he make some other arrangements for that?

MS. PERKINS: I doubt it. That's why I have to pick him up, because he doesn't drive.

MS. daPONTE: Oh, I see. So there's no way he could get from New Orleans to Lafitte if you didn't go pick him up?

MS. PERKINS: [110] [572] No.

MS. daPONTE: Could he make some arrangements to take a bus maybe?

MS. PERKINS: No, there's not bus running to Lafitte.

MS. daPONTE: No buses go to Lafitte.

And would there be anybody that he could – if this were Friday, we'd probably be finished up on Saturday, would there be anybody that he could stay with Friday night in New Orleans?

Where does he stay when he's in New Orleans?

MS. PERKINS: No, he goes on the boat.

MS. daPONTE: I see.

MS. PERKINS: He works on a river tug.

MS. daPONTE: I see.

MS. PERKINS: And he works seven days, and then he comes home on Friday and I have to pick him up.

MR. WILLIAMS: Ma'am, if you got stuck on this jury, and you wouldn't be able to pick him up, would you be worrying more about him than listening to the evidence?

[111] [573] MS. PERKINS: Yes sir, I would.

THE COURT: What does he do on the boat, what does he do on the boat?

MS. PERKINS: They dock the ships in the river.

He works for Bisso.

THE COURT: Well, what is his job, do you know?

MS. PERKINS: Whatever he has to do, throw the heavy lines out, whatever he has to do. They've got twelve hour shifts.

THE COURT: All right, we're going to excuse you for cause.

(MS. PERKINS LEFT THE BENCH)

MS. GAFFNEY: Hi, Terrie Gaffney.

I have a work related problem. I'm an optician, I work for a doctor, I'm the only person in the office. So when I'm not there, and they can't find someone to take my place, we have to close it down. So that means I don't even get sick; when I'm sick I go to work. So this would be a hardship to the doctor.

MS. daPONTE: Who's the doctor?

MS. GAFFNEY: Doctor Ernest A. Wilbur.

[112] [574] MS. daPONTE: And –

THE COURT: Is there anybody else they could get to work?

MS. GAFFNEY: We have a part-time employee, and she is there today, thank goodness, because I received my summons on Saturday, so she was able to take my place today. But we don't know about the rest of the week, she has her own existence other than our office.

THE COURT: All right. Let's do this, why don't we call.

THE LAW CLERK: Doctor who?

MS. GAFFNEY: Doctor Wilbur, W-I-L-B-U-R. He would be at the downtown office, it's 561-8416.

THE COURT: We're going to call and see if he can make some other arrangements, if he can.

MS. GAFFNEY: Okay.

THE COURT: Why don't you have a seat over there.

(MS. GAFFNEY LEFT THE BENCH)

MR. ALARIO: Your Honor, in addition to a number of other conflicts, I have a – my name is Robert Alario, I'm sorry.

[113] [575] I have affiliation with one of the gentlemen to the back, Mr. Floyd, I understand he's with the D.A.'s Office, and I don't know if that, by itself – I can go into a number of other problems I have.

MR. WILLIAMS: What are the other problems?

MR. ALARIO: The other problems I have at this moment, as we speak, a crew of people, I have to appear tomorrow at the Jefferson Parish Harahan Courthouse, and I've got a whole bunch of people that have been waiting for me to make a presentation.

In addition I've got about six workmen that are dealing with a very complicated plumbing – and it could create some residency problems with some people, and that's what I'm preparing for.

MS. daPONTE: Which – what do you do Mr. Alario?

MR. ALARIO: I'm a consultant.

MS. daPONTE: And you consult with who, at this point?

MR. ALARIO: I do off-shore oil and gas in particular, yeah.

MS. daPONTE: And this, the people that you have the meeting with now, –

MR. ALARIO: [114] [576] No, this has to do with City Government.

MS. daPONTE: Okay. Are you a consultant for the City?

MR. ALARIO: No, I'm appearing for the applicants –

MS. daPONTE: Okay.

MR. ALARIO: – with a problem that has to do with –

MR. WILLIAMS: Let me ask you this about Walter.

MR. ALARIO: Yes, sir.

MR. WILLIAMS: He's not going to do anything in this case, other than assist us, and he didn't play a part in the investigation –

MR. ALARIO: He's worked for me in the past. I didn't know if that had anything to do with –

MR. WILLIAMS: No, not unless it would cause you to change your opinion.

MR. ALARIO: This would – no, it wouldn't cause me to change my opinion.

This would create more problems for me because I have people who are depending on what I'm doing, whether or not they'll be [115] [577] able to stay in their homes for the next month. And this has been going on for a month, and tomorrow night is just the timing problems.

MR. WILLIAMS: Can you delegate any of your authority?

MR. ALARIO: I wish I could. I wish I could.

I stayed longer, because I thought – wanted to see how you all would fair with all this, and I'm more than prepared to serve for a day.

But when I realized that it might take, you know, as long as it has, this creates an extreme hardship, it involves a lot, a lot of time –

MS. daPONTE: We will probably, possibly finish as early as Saturday. Does that help at all?

MR. ALARIO: Tomorrow is the critical day, –

MS. daPONTE: Tomorrow is the day. Okay.

MR. ALARIO: – and Thursday. So actually, it gets worse –

MS. daPONTE: It gets worse.

MR. ALARIO: – at the head rather than at the end.

Recognizing the problem you all are having, I'd like to help, I just don't know [116] [578] if –

MR. WILLIAMS: Trust me, we would like you to also –

THE COURT: We're going to go ahead and excuse you. We're going to go ahead and excuse you. Get your card and go downstairs.

MS. daPONTE: Thank you, Mr. Alario.

(MR. ALARIO LEFT THE BENCH)

(DISCUSSION OFF THE BENCH)

THE COURT: Next.

MR. WEBB: George Webb, W-E-B-B.

Since I have an aunt that's taking cemo [sic] right now, and she's supposed to go into the hospital tomorrow, or the next day. And what the problem is, she has three dogs and two birds, and she lives way out in Lockport, and my uncle that would be able to take care of them, he's out, he works off-shore, and he works in San Diego. And so I have to go out there every morning.

MR. WILLIAMS: Nobody else –

MR. WEBB: And the problem – no.

MR. WILLIAMS: – can feed the dogs?

MR. WEBB: No. The problem isn't so much the [117] [579] feeding, is two of them take phenobarbital because they have seizures, they're beagles, they're prone to having seizures, so I have to give them that two days – two times a day, just two of the dogs. The other one is all right.

MR. WILLIAMS: Any objection? Any objection?

THE COURT: All right, we'll excuse you.

(MR. WEBB LEFT THE BENCH)

MR. WILLIAMS: That's it.

THE COURT: Get the next group in here.

(MS. PICKETT APPROACHED THE BENCH)

MS. PICKETT: He was just unemployed from May 15th to the 19th of this month.

MS. daPONTE: Could you speak into the microphone?

THE COURT: The child is thirteen?

MS. PICKETT: Yes. I have a thirteen year old son, and my husband was unemployed from May 15th to August 19th, he just went back to work Monday before last, a week ago yesterday.

MS. daPONTE: Oh, that's right, that's right. And he doesn't know when he gets off?

MS. PICKETT: [118] [580] That's right, he works at a car dealership in sales –

MS. daPONTE: Right.

MS. PICKETT: – and he's new to sales, so it's erratic hours.

MS. daPONTE: Okay.

MR. WILLIAMS: The bottom line, ma'am, is if you're selected as a juror, you can listen to the evidence in the case, and it's a hardship, it's a hardship for all of us, and if you're going to be so worried about things going on outside that you can't listen to the evidence, that's what's important.

MS. PICKET: Well, if I know my son is home alone I will be, and that's honest.

THE COURT: All right. I'm going to go ahead and excuse you.

MS. PICKETT: Thank you.

(MS. PICKETT LEFT THE BENCH)

(END OF CONFERENCE)

(THE JURORS WERE BROUGHT INTO THE COURTROOM)

THE COURT: Yes, some of you may move up here and sit in the jury box.

All right. Ladies and Gentlemen, this [119] [581] is Division "H" of the Twenty-Fourth Judicial District Court. I am Skip Hand, Judge for this division, and I'd like to take this opportunity to express our appreciation to each of you for your participation in the jury system, which maintains civil and criminal laws.

I apologize for any inconvenience this may cause you, but I assure you that your presence is indeed necessary.

I would like to introduce the court personnel at this time. We have Shea Pertuit and Becky Loup, our clerks. We have Linda LaBorde our court reporter. We have Roy LeBlanc our deputy. And we have Angela Gerrets our law clerk.

The State of Louisiana mandates that potential jurors meet certain requirements.

You must be a citizen of the United States and of Louisiana, and have resided in Jefferson Parish for at least on year prior to today.

You must be at least eighteen years of age.

You must be able to read and write English.

You must not be interdicted or incapable of serving because of a mental or physical infirmity.

You must not be under indictment for a felony, or convicted of a felony for which you have not been pardoned.

[120] [582] If you fail to meet any of these qualifications, please raise your hand at this time.

MR. WALKER: I have two charges –

THE COURT: Yeah, why don't you come forward, sir.

Why don't you all come – anyone who fails to meet any of those qualifications, please come forward and form a line right here on the side.

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

MR. WILLIAMS: What's your name, sir?

MR. WALKER: Bruce Walker.

THE COURT: Why don't you stay there ma'am, for now.

What's your problem, sir?

MR. WALKER: No, I said I have felony records.

THE COURT: You do?

MR. WALKER: And I'm on probation.

MS. daPONTE: Okay. You're on probation. Okay, I thought you said that.

For what?

MR. WALKER: Distribution.

MS. daPONTE: [121] [583] Okay.

THE COURT: Okay.

MS. daPONTE: Thank you, Mr. Walker.

THE COURT: All right, we're going to go ahead and excuse you.

(MR. WALKER LEFT THE BENCH)

THE COURT: Get a card and go downstairs.

MR. WALKER: Okay, thank you.

THE COURT: Next.

MS. HOFFMAN: I fell and broke my shoulder –

MR. WILLIAMS: What's your name, ma'am?

MS. HOFFMAN: Frances Hoffman.

MR. WILLIAMS: Frances Hoffman.

MS. HOFFMAN: I fell and broke my shoulder in March, and I'm in a lot of pain with my shoulder and my neck, and bad knees. It really got to me coming up those steps, you know.

THE COURT: Do you take medication for that?

MS. HOFFMAN: Yes. I take Naprosyn for the arthritis, [122] [584] and Darvocet, a pain pill, and muscle relaxers.

THE COURT: Do you have your medication with you?

MS. HOFFMAN: Yes.

THE COURT: Okay.

MS. daPONTE: Let me ask you a couple of questions about the Naprosyn and the Darvacet, mostly Darvocet. When you take that do you find it difficult to pay attention?

MS. HOFFMAN: Well, it makes you drowsy.

MS. daPONTE: It makes you drowsy, the Darvocet makes you drowsy.

MS. HOFFMAN: It makes you drowsy. Well, both of them make you drowsy.

MS. daPONTE: It's difficult to pay attention.

Do you have to take that every day for your shoulder?

MS. HOFFMAN: Yes

MR. WILLIAMS: I have no questions.

MS. daPONTE: I don't have any others.

THE COURT: [123] [585] We're going to excuse you.

Get a card from the deputy.

(MS. HOFFMAN LEFT THE BENCH)

MR. OLINDE: Shirley Fleming is next.

THE COURT: Okay.

MS. FLEMING: I have sugar diabetes, and I also have bad nerves, I take medication for it.

THE COURT: You think that would prevent you from being a juror?

MS. FLEMING: Pardon me?

THE COURT: Do you think that would prevent you from being a fair juror in this case?

MS. FLEMING: I know I have to eat on time, and my diabetes –

MS. daPONTE: Sure.

THE COURT: How often do you eat?

MS. FLEMING: – I have to eat on time.

THE COURT: How often?

MS. daPONTE: How often do you have to eat for your diabetes?

[124] [586] MS. FLEMING: Uh, like breakfast, dinner, snacks, and supper.

THE COURT: Yeah. Well, we'll be taking breaks so that you'll be able to eat on time. Okay?

MS. daPONTE: Do you have your medication with you?

MS. FLEMING: I just have my pills with me –

MS. daPONTE: But you can –

MS. FLEMING: – for my diabetes, I brought two of them in case.

MS. daPONTE: Okay. This case may last awhile, could you get some medicine brought to you if you needed it?

MS. FLEMING: My daughter – three daughters, they work. I take insulin at night, but I be home, I know, at that time.

MS. daPONTE: We'll get back to you on that.

MS. FLEMING: Okay.

THE COURT: Have a seat.

(MS. FLEMING LEFT THE BENCH)

THE COURT: Next.

[125] [587] MR. WILLIAMS: We'll need your name, sir.

MR. WILLIE BROOKS: Willie Brooks.

I don't read or spell that well, Your Honor.

THE COURT: You don't' read and write?

MR. WILLIE BROOKS: No.

MR. WILLIAMS: Excused.

THE COURT: We're going to go ahead and excuse him.

(MR. WILLIE BROOKS LEFT THE BENCH)

MS. daPONTE: Wait. Well, I have a couple for him.

I'm sorry, Mr. Brooks, Mr. Brooks, Mr. Brooks.

THE COURT: Mr. Brooks.

MS. daPONTE: Just a minute.

(MR. WILLIE BROOKS APPROACHED THE BENCH)

MS. daPONTE: I just have a couple of questions, Mr. Brooks. You said you don't read and spell that well. Can you read a little bit?

MR. WILLIE BROOKS: A little bit.

MS. daPONTE: Can you write a little bit?

[126] [588] MR. WILLIE BROOKS: Yeah.

MS. daPONTE: I think –

THE COURT: Oh, okay. All right, I'm sorry, I misunderstood you.

MS. daPONTE: Thank you, Mr. Brooks.

THE COURT: All right, have a seat.

(MR. WILLIE BROOKS LEFT THE BENCH)

MS. ROGERS: Regina Rogers.

MR. WILLIAMS: No questions.

MS. daPONTE: Ms. Rogers, do you have anybody you can leave these children with?

MS. ROGERS: No. If I had I would have, –

MS. daPONTE: Yeah, yeah.

MS. ROGERS: – because I got the notice yesterday for to be here today.

MS. daPONTE: Well, let me just ask you, was it because you didn't have time to make arrangements?

MS. ROGERS: I couldn't make no arrangements.

[127] [589] MS. daPONTE: Or you just – there aren't arrangements to make?

MS. ROGERS: I really had to get somebody to drive, because I wasn't supposed to drive, I had surgery on my hand.

MS. daPONTE: You did.

MR. WILLIAMS: Okay.

MS. daPONTE: Where do you live?

MS. ROGERS: Marrero.

MS. daPONTE: Do you live with anybody?

MS. ROGERS: My children.

MS. daPONTE: Just your children. No other grown-ups.

Do you have any family that could help you out?

MS. ROGERS: Yeah, working.

MS. daPONTE: Working. And no neighbors that could take care of kids? No?

MS. ROGERS: No.

MR. WILLIAMS: No questions.

[128] [590] MS. daPONTE: That's all.

THE COURT: All right, we're going to go ahead and excuse you.

(MS. ROGERS LEFT THE BENCH)

MR. SANDERS: Michael Sanders.

I just need to make you aware I'm an insulin dependent diabetic, and I do not have my medication with me. I just wanted to make you aware that if I was sequestered, someone would have to bring it to me.

MR. WILLIAMS: No problem.

THE COURT: All right, that will be fine.

MS. daPONTE: Thanks.

(MR. SANDERS LEFT THE BENCH)

MS. ONETO: I don't know if I'm eligible or not. If this is – Faye Oneto.

MS. daPONTE: Fay O'Neill.

MS. ONETO: Oneto.

MS. daPONTE: Oh, I'm sorry, Oneto.

MS. ONETO: But I made arrangements today for my mother to get her insulin shot, but I won't [129] [591] be if it goes tomorrow, I don't have – she's diabetic, and she can't give herself the shots, and I have to do it, so that's why – like sometimes, like I work part-time a little bit, but I try to arrange my hours so that I'm there when she needs her shots.

MS. daPONTE: Does she live with you?

MS. ONETO: Yes. She wanted to move back to Florida, because she thought she could take care of herself, but she found out she couldn't, she was there for a week.

MS. daPONTE: There's nobody that lives with you that could help you out?

MS. ONETO: No.

MS. daPONTE: You said you did make arrangements for today?

MS. ONETO: Uh huh.

MS. daPONTE: Could the same person that you made arrangements with –

MS. ONETO: She's having to take off from work to do it.

THE COURT: Okay. All right, we're going to go ahead and excuse you for cause.

[130] [592] (MS. ONETO LEFT THE BENCH)

MS. SANDRA BROOKS: Sandra Brooks.

MR. WILLIAMS: Sandra Brooks.

MS. SANDRA BROOKS: I have a dance studio, I'm the owner. I had gotten my notice last night when I got home from teaching, at 8:00, and I have no one to take my classes, or do my choreography for my students. If I would have time to notify the parents, because I did just get it last night. I kind of wrote a little note, but –

MS. daPONTE: How many classes do you have scheduled between now and Saturday?

MS. SANDRA BROOKS: Every day. I have class every day.

MS. daPONTE: A class every day, or several?

MS. SANDRA BROOKS: Several, I start at 3:00, and I work til 8:00, 9:00. I even work on Saturdays.

MS. daPONTE: And how many students would you have to call between now and the time the trial started?

MS. SANDRA BROOKS: I have three hundred and fifty.

MS. daPONTE: Okay.

[131] [593] MS. SANDRA BROOKS: If I had had time, I might could have –

MS. daPONTE: All right.

MS. SANDRA BROOKS: I just – I didn't –

THE COURT: Yeah, okay. We're going to excuse you.

MS. SANDRA BROOKS: Thank you.

THE COURT: You need to get a little tag from –

MS. SANDRA BROOKS: Thank you very much.

(MS. SANDRA BROOKS LEFT THE BENCH)

MR. OLINDE: Willie's got another question.

MR. WILLIE BROOKS: I don't think, really that I read well enough to, you know, really decide over someone.

MS. daPONTE: Well, I don't know that –

THE COURT: There's not a lot of reading involved.

MS. daPONTE: I don't know that there would be that much reading to do.

MR. OLINDE: Do you think you could read the word Autopsy?

MR. WILLIE BROOKS: [132] [594] Autopsy?

MR. OLINDE: Yeah.

MR. WILLIE BROOKS: I couldn't spell it.

MR. OLINDE: How about Coroner?

MS. daPONTE: Well, I don't –

MR. WILLIAMS: If he can't read, we've got a – we've got some documents that have to be read, that are very important.

MS. daPONTE: Those documents will be heard as well.

MR. WILLIAMS: No, but – I object.

MS. daPONTE: Okay.

MR. WILLIAMS: You don't feel that you can read well enough to be comfortable?

MR. WILLIE BROOKS: No, no.

MR. WILLIAMS: This is a death penalty case.

MR. WILLIE BROOKS: Yeah. Well, that's what I'm saying, I –

MS. daPONTE: Mr. Brooks, did you – how far did you get in school?

[133] [595] MR. WILLIE BROOKS: The eighth.

MS. daPONTE: You can read some, and you can write some, correct?

MR. WILLIE BROOKS: Yeah.

MS. daPONTE: Okay. That's all I wanted to ask.

THE COURT: All right. I'm not going to excuse you for cause. You have to have a seat.

MR. WILLIE BROOKS: All right.

(MR. WILLIE BROOKS LEFT THE BENCH)

(END OF CONFERENCE)

THE COURT: In this case the defendant Allen Snyder is charged with first degree murder. The defendant is seated before the Bar. He is represented by Graham daPonte and Casear [sic] Vazquez.

MS. daPONTE: Good morning ladies and gentlemen.

MR. VAZQUEZ: Good morning.

THE COURT: The Assistant District Attorney is James Williams, who is assisted by Alfred Olinde and Walter Floyd.

MR. WILLIAMS: Good morning ladies and gentlemen.

[134] [596] MR. OLINDE: Good morning.

THE COURT: Does anyone here know any of these people?

Will you come forward, sir. Yeah, come on forward.

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

THE COURT: Who do you know?

MR. OTIS: Sorry, Alexander Otis.

I know Casear [sic], right here.

THE COURT: Do you – are you all acquaintances or friends?

MR. OTIS: In high school we played on ball teams together, things like that.

THE COURT: Okay. Do you think that would effect –

MR. OTIS: Well, I've got –

THE COURT: – your ability to be a fair juror?

MR. OTIS: Well, that, and well, I'm going out of town Thursday, too. But yeah, I think it would effect something. I think he's a good guy.

MR. VAZQUEZ: I'm not on trial.

[135] [597] MR. OTIS: I know.

MR. VAZQUEZ: Good thing.

THE COURT: All right, we're going to go ahead and excuse him for cause.

(MR. OTIS LEFT THE BENCH)

(END OF CONFERENCE)

THE COURT: The purpose of this part of the proceedings is to select a jury.

The jury must find the facts in this case based upon the evidence presented at the trial.

You must truthfully answer the questions which the lawyers and I will ask. These questions solely are for the purpose of helping the lawyers learn about those persons who may be called upon to serve as jurors.

Please do not be offended by the questions. They are simply a means of learning something about prospective jurors.

The lawyers or I may excuse some of you if it is felt that you may not be an appropriate juror for this particular case. Being excused in no way reflects upon you personally, or upon your ability or integrity.

Because this is a first degree murder case, it is required that the jurors be [136] [598] separated or sequestered. Thus, if selected to serve as a juror, you will be housed at Travel Lodge Hotel, westbank, and will not be able to go to your home or job until the trial is concluded.

You will not be permitted to make unmonitored communications.

The trial is expected to go into the weekend. Considering the sequestration requirement, we now need to know if there are any prospective jurors who would suffer extreme hardship should they be chosen for this jury.

Okay. Will those people please come and line up here on the side.

Will the rest of you all follow Officer LeBlanc to the other jury room.

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

MS. PENNING: Dianna Penning.

MR. VAZQUEZ: I'm sorry?

MS. PENNING: Dianna Penning.

I'm in grad. school, and today is my first day of classes, and I'm missing them.

THE COURT: Where do you go to, what school?

MS. PENNING: I go to U.N.O..

THE COURT: U.N.O., okay.

[137] [599] MS. daPONTE: What are you studying?

MS. PENNING: Historic preservation, anthropology, it's a master's of science.

MS. daPONTE: And where is that?

MS. PENNING: U.N.O..

MS. daPONTE: U.N.O.. Do you think you could maybe make up what you would miss in the next few days? It would be probably just, Tuesday, Wednesday, Thursday, Friday, and we'll probably finish on Saturday.

MS. PENNING: Well, I also work, so.

MS. daPONTE: Okay. Where do you work?

MS. PENNING: I work at Dillard's, credit clerk.

MS. daPONTE: And what's your work schedule for these next four days?

MS. PENNING: Tomorrow morning I open, 6:45 to 4:00. Thursday I go to class, and I close the store, 1:30 to 9:30. Friday and Saturday are pretty much the same.

MS. daPONTE: Okay. So we're talking about four days of work. Okay.

[138] [600] MS. PENNING: I close both nights.

MS. daPONTE: Can you be relaxed just for those four days?

MS. PENNING: Well, we're short actually, right now, at work.

MS. daPONTE: Do you –

MS. PENNING: And school, I'd rather not miss at all.

MS. daPONTE: Sure, sure. We'd all rather not – I'd rather go on vacation.

MR. OLINDE: Ms. Penning, do you think that if you missed school and missed work that your mind would be in those places instead of here in the courtroom listening to evidence?

MS. PENNING: Oh, yes, yeah.

MR. OLINDE: As to –

MS. PENNING: Well, work – I mean, school more so than work.

MR. OLINDE: Do you think it would cause you to be an unfair juror in this case?

MS. PENNING: Probably so, I tend to worry a lot, so [139] [601] I'd be worried a lot.

MR. OLINDE: I have no other questions.

THE COURT: All right, we're going to go ahead and excuse you.

MS. PENNING: Okay. Thank you.

MS. daPONTE: Note our objection.

(MS. PENNING LEFT THE BENCH)

THE LAW CLERK: We have some information on Terrie Gaffney. She works at Doctor Wilbur's office, and he says she's the only worker, and No, the part-time worker cannot stay.

THE COURT: All right.

THE CLERK: Ms. Gaffney.

(MS. GAFFNEY APPROACHED THE BENCH)

THE COURT: All right, we're going to go ahead and excuse you.

MS. GAFFNEY: Okay. Thank you.

(MS. GAFFNEY LEFT THE BENCH)

MR. VAZQUEZ: What was her name?

THE COURT: Terrie Gaffney.

MS. daPONTE: [140] [602] Terrie Gaffney.

THE COURT: Okay, next.

MR. SCOTT: Francis Scott.

I have three different reasons. At the end of this week, Thursday morning, I have an act of sale, then we have to leave and go to North Carolina for another act of sale. If I'm not there, we're going to lose the property.

MS. daPONTE: When are you leaving for North Carolina?

MR. SCOTT: Pardon me?

MS. daPONTE: When are you leaving for North Carolina, when are you scheduled to go?

MR. SCOTT: Thursday afternoon.

MS. daPONTE: Thursday.

MR. OLINDE: Have you bought your plane tickets already?

MR. SCOTT: We're driving.

MR. OLINDE: Okay. I have no other questions, Judge.

MS. daPONTE: I don't have any more, Judge.

THE COURT: [141] [603] Okay. We're going to go ahead and excuse you.

MR. SCOTT: Okay.

(MR. SCOTT LEFT THE BENCH)

THE COURT: Next.

MS. QUICK: Jean Quick, or Mary Quick, it's under Mary.

I just started a new job, and I'm single, and I need my job.

THE COURT: Do they have like any jury duty policy where they pay you for that?

MS. QUICK: I have to reimburse them.

THE COURT: Okay. Would it be a hardship on you?

MS. QUICK: Yes, it would, very much so.

MS. daPONTE: Where is tis [sic] place?

MS. QUICK: I'd better not say, I might lose my job.

THE COURT: Okay. I'm going to go ahead and excuse you.

MS. QUICK: Thank you.

(MS. QUICK LEFT THE BENCH)

THE COURT: [142] [604] Next.

MS. WAITS: My name is Aubrenall Waits.

I have two young kids to take care of, a two year old and an eight year old.

THE COURT: Is there anybody who could take care of them for you?

MS. WAITS: My mother could, but she works, and she doesn't have any transportation.

THE COURT: Any neighbors or any friends?

MS. WAITS: No neighbors.

MS. daPONTE: How old are your kids?

MS. WAITS: Two and eight.

MS. daPONTE: If someone were to take your – would get your kids to your mother's house, – she works though?

MS. WAITS: Uh huh.

MS. daPONTE: She works every day?

MS. WAITS: Right, except Sundays.

MR. OLINDE: Ma'am, do you think that if you were serving on this case in a sequestered [143] [605] atmosphere, that you'd be thinking more about your children than you would about the evidence in this case? And would it cause you to be an unfair juror, that's what I'm asking?

MS. WAITS: No.

MR. OLINDE: Okay. Can you – you do have someone who can take care of the kids or not?

MS. WAITS: I do, but she don't have transportation to get them to school and to the babysitter.

MR. OLINDE: Is there anyone else who can do that for you, that you know of?

MS. WAITS: Not off hand.

MS. daPONTE: Let me ask you, –

MS. WAITS: Uh huh.

MS. daPONTE: – if you are given the opportunity to think about it, and make some phone calls, do you think there might be some way you could work this out?

MS. WAITS: Perhaps, yes.

THE COURT: All right. Why don't you have a seat [144] [606] over on the bench.

MR. WILLIAMS: We're in business with a hundred and ten. You've got – we've got twelve cuts for each side, plus fourteen jurors, that's twenty eight. So that gives us seventy – eighty two challenges for cause. And a hundred and ten is going to be about the most this courtroom can hold, comfortably.

THE COURT: Okay.

MS. daPONTE: Just let me put my – I just want to object for the record, and that's all.

THE COURT: All right. Let's go.

Do you all want to do it –

MR. WILLIAMS: Why don't you do it after you excuse these people.

THE COURT: Okay.

Roy, why don't you escort the ones that are over there on that bench to the jury room.

THE DEPUTY: Okay.

THE LAW CLERK: Except for Ms. Miller, we're still waiting to hear from East Jefferson Hospital.

THE COURT: [145] [607] Okay.

(DISCUSSION OFF THE RECORD)

MR. OLINDE: Are we waiting for calls or something?

THE LAW CLERK: Ms. Miller, we're waiting for east Jefferson Hospital to call.

MR. WILLIAMS: I think we can – Judge, I think the question you need to ask, to totally protect the record, and I don't think it needs protecting, is ask the people, All of you who have certifiable reasons why you can't serve, please raise your hand, and then just excuse them.

MR. OLINDE: And put them under oath.

MR. WILLIAMS: Yeah, put them under oath and ask them the question.

MR. OLINDE: And then if they say yes, then –

MR. WILLIAMS: That's the end of that.

THE COURT: Okay. All right, let's do that.

(END OF CONFERENCE)

THE COURT: We're going to go ahead and swear everybody in here, at this point in time. So everybody stand to be sworn.

MR. OLINDE: [146] [608] What about these two?

THE COURT: Yeah, let them stand and be sworn also.

MS. daPONTE: No, no, no. Wait, wait, wait. Judge, Judge, Judge, these people here, we've decided would stay with us, correct?

THE COURT: I'm sorry?

MS. daPONTE: I'm sorry, these people here, we've decided would stay with us, right?

THE COURT: Well, we're waiting for some phone calls.

MS. daPONTE: At least –

THE DEPUTY: Do you want them escorted out?

THE COURT: Yes. Why don't –

THE LAW CLERK: Ms. Miller is the only one we're waiting on a phone call.

THE COURT: Yeah, let's go ahead and escort them over to the room until we get the phone call.

(THE PROSPECTIVE JURORS WERE SWORN)

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

THE COURT: I need to do just one at a time, or [147] [609] should I do them as a group?

MR. WILLIAMS: As a group, do you all swear that you have a reason for not serving on this jury, a reason which would cause you excessive hardship.

THE COURT: Okay.

(END OF CONFERENCE)

THE COURT: All right. Do you all swear that you have a reason for not serving on this jury, that would create an extreme hardship for you? Do all of you all swear that?

Does anyone not have such a reason?

A JUROR: I do. My husband –

MR. WILLIAMS: She didn't understand what we said.

THE COURT: Yeah, no – I'm saying, ma'am, I'm saying, Do you swear that you have a reason that would create an extreme hardship for you to serve on this jury.

A JUROR: Yes.

THE COURT: Okay. Does everyone here have a reason that would create an extreme hardship for them to serve on this jury?

(ALL PROSPECTIVE JURORS INDICATED IN THE AFFIRMATIVE)

[148] [610] THE COURT: Okay. All right, what we're going to do, is we're going to go ahead and excuse you all from serving. You all need to pick up a slip from the clerk, the clerk is right there, so why don't you all pick up a slip from her and go down to the jury room. Okay?

(THE PROSPECTIVE JURORS LEFT THE COURT-ROOM)

THE COURT: Graham, why don't you all come forward.

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

MR. MOORE: Robert Moore, M-O-O-R-E.

I don't have an extreme hardship, I am a diabetic and I just need to check on the sequestering procedure.

THE COURT: Okay. Okay, we can handle that for you. We have a number of diabetics that are already on the panel.

MR. MOORE: Okay.

THE COURT: So we're going to be working with them, and make sure they have their medications, and there will be a police officer there that can take anyone to the hospital that needs to go.

MR. MOORE: All right.

THE COURT: [149] [611] Okay?

MR. MOORE: I'll need things like snacks at night but that won't be any problem.

THE COURT: Okay. Great.

All right, we need to escort you to the – Walter can escort you to the jury room. Okay?

MR. FLOYD: Is he still on?

THE COURT: Yeah.

MR. FLOYD: Okay.

THE COURT: All right, you two, before you go off, do you all want to break, I'll bring them in, and then – you need to put your objection on the record.

MS. daPONTE: I thought I did that.

MR. WILLIAMS: She did that.

THE COURT: Okay. All right, and then I'll bring them in and swear them in, and then we'll break for lunch I guess, huh?

MR. WILLIAMS: Very good.

MS. daPONTE: Since we have all those diabetics out [150] [612] there, do we have a choice?

THE COURT: Would counsel please approach.

(THERE WAS AN OFF THE RECORD CONFERENCE)

THE COURT: All right, let's go ahead and swear in the jurors. Everybody please stand to be sworn.

(THE PROSPECTIVE JURORS WERE SWORN)

THE COURT: We're going to go ahead and break or Clerk for lunch now. We're going to break until 1:30. Okay?

I need to caution and admonish all of you not to discuss the case. I know you don't know much about the case at this point, but do not discuss the case at all among yourselves yet.

We're going to be back here – you need to report back to this courtroom at 1:30, and we'll continue with the jury selection at that time.

MS. daPONTE: Tell them not to read any newspaper articles.

THE COURT: Yeah, you are also cautioned not to read any newspaper articles, or listen to any T.V. programs or radio programs about this case, at this time. Okay?

All right, we'll all meet back here at 1:30.

[151] [613] (THE COURT STOOD IN RECESS)

(RECESS IS OVER)

THE COURT: Okay. We're going to get some more chairs for those of you who are still standing, so please bear with us. Okay?

At this time we will select at random thirteen persons to be called to be questioned.

Those of you who are not called should also listen very carefully to the questions.

Okay, please draw thirteen names at random.

MR. WILLIAMS: We're going to have to get these people out of here.

THE COURT: What we're going to have to do, is you all – we're going to have to move you all out of here so we can go ahead and put the thirteen prospective jurors there.

Some of you all might be called.

Unfortunately, as you can see, this courthouse wasn't made to accommodate these types of trials, but we're going to do the best we can.

All right, as your name is called, please come up and sit in the jury box.

THE LAW CLERK: Number 37, William E. Bennett.

THE COURT: The bottom row, all the way down. Right [152] [614] here on the end, the first seat.

THE LAW CLERK: Number 54, Dominick J. Bondi; number 331, Lynette Lebourgeois; number 74, Jeffrey B. Brooks; number 78, Harlan S. Brown; number 59, Peggy Boudreaux; number 62, William P. Bourgeois; number 68, Polly C. Braud; number 340, William R. Lewis; number 345, Barbara Lovell; number 88, Brendan Burns;

number 464, Marian G. Remond, number 115, Lenor P. Clerk.

THE COURT: Okay, ladies and gentlemen, these proceedings are being recorded, so please speak loudly and clearly.

I will begin by asking each of you to give your full name, address, occupation, marital status, and the number and ages of your children, if any. If you are married, please tell us your spouses [sic] occupation if your spouse is employed outside the home.

Let's begin with you, sir.

MR. BENNETT: My name is William Bennett, William Edward Bennett, 2146 Mars Street, Harvey, Louisiana.

I'm a certified emergency nurse, and I'm married. I have two children, ages fifteen and thirteen.

MR. BONDI: My name is Dominick Joseph Bondi, I'm a Captain on the New Orleans Police [153] [615] Department.

I'm married, I live at 1512 Houma Boulevard in Metairie. I have two children, ages fourteen and eleven, and my wife is a housewife.

MS. LEBOURGEOIS: Lynette Marie Lebourgeois. I work at Entergy as a customer assistant person.

I am not married. I live at 4825 Alphonse Drive in Metairie. And no children.

MR. BROOKS: Jeffrey Bevin Brooks, number 852 Kathy Drive, Gretna, Louisiana.

I'm twenty six, I'm single, and have no children.

MR. BROWN: Harlan S. Brown. I'm married, my wife is a teacher, she's pregnant. I live at 195 Ravan Avenue, that's Harahan.

I'm an auto mechanic.

MS. BOUDREAUX: Peggy M. Boudreaux. I live at 612 Avenue E in Marrero.

I'm a registered nurse. My husband is an accountant. And I have two children, twenty five and twenty one.

MR. BOURGEOIS: William P. Bourgeois. I'm a contractor. I live at 2725 Sear Drive in Kenner.

I'm married, my wife is a CPA. I have three children, twelve, nine, and four.

[154] [616] MS. BRAUD: Polly Braud. My husband just died, he was an engineer. I'm a retired school teacher.

I live at 2328 Little Flower Lane, Marrero, Louisiana.

We have four sons, forty four, forty two, thirty seven, thirty eight.

MR. LEWIS: William R. Lewis, 2100 East Ridgelane, Marrero.

Married, four children, twenty three, twenty two, nineteen, and twelve.

MS. LOVELL: Barbara Lovell. I –

MR. WILLIAMS: Excuse me, I'm sorry ma'am.

Mr. Lewis, what do you do for a living, sir?

MR. LEWIS: I work for Avondale Shipyards.

MR. WILLIAMS: I'm sorry, ma'am.

MS. LOVELL: Barbara Lovell, 2600 Houma Boulevard. I'm single, and I'm a general clerk.

MR. BURNS: Brendan M. Burns. I live at 410 Heritage Avenue in Terrytown.

I have two daughters, seventeen and fourteen.

I manage a landscape construction [155] [617] company.

MS. REMOND: Marian Remond. I'm married. My husband is with the Jefferson Parish Sheriff's Office. We live at 2800 Danny Park in Metairie.

I'm a secretary. We have two children ages thirty two and twenty eight.

THE COURT: What does your husband do for the Sheriff's Office?

MS. REMOND: He works with the Detective – he's a detective with the school intervention program.

MS. CLERK: My name is Lenor Clerk. I'm a crossing guard for the Jefferson Parish Sheriff's Department.

I'm also a certified nursing assistant. I have seven kids, ages seventeen, sixteen, fifteen, thirteen, twelve, ten, and nine.

My husband is also employed with the Sheriff's Department.

THE COURT: Okay. Please answer the questions of the attorneys.

MR. WILLIAMS: Thank you, Your Honor. May it please the Court, ladies and gentlemen.

Good afternoon. As I was introduced [156] [618] this morning, my name is Jim Williams, and I'm an assistant District Attorney, and I will be representing the State of Louisiana in the prosecution of this case, along with Mr. Fred Olinde, who was likewise introduced to you this morning.

A gentleman that you'll be seeing – you've already seen today running back and forth, is our investigator. His name is Walter Floyd.

Now, ladies and gentlemen, as you are aware, this portion of the trial is what is known as the – technically it's called voir dire, but this is the jury selection. It's the part of the trial where the lawyers here will be asking you all questions so that we can get some information, some limited information from you all so that we can make a decision about who we want to select to hear this case.

And I can assure you that all the questions that we ask you are solely for that purpose. If we ask questions that might seem to you like we're prying, we certainly don't mean that, but we have to pick from amongst your number, twelve of you who could sit in this case. Actually, we'll pick twelve jurors, and probably two alternates, who can assure us that you all will be fair and impartial, not only to the defendant before the Bar, who you've been introduced to, his name is Allen Snyder, but [157] [619] also to the State in this case. So both sides want jurors who can be fair, as well as impartial.

Now, ladies and gentlemen, as you were briefly told this morning, the case that's going to be heard in Division "H" this week is a case of first degree murder.

The Grand Jury for the Parish of Jefferson indicted Allen Snyder for the first degree murder of a fellow by the name of Howard Wilson. This occurred back in August of 1995 in an area between Kenner and River Ridge here in Jefferson Parish. That is the case.

Now, I don't recall this case receiving a great deal of publicity, however there might be some of you all who live in that part of town who may know something about it. So just briefly, by a show of hands, are there any of you all who have any familiarity with this case. Okay. I didn't think so.

But we can't, at this point in the trial, say anything at all about the case, the facts of the case, but we might say something that might trigger a memory, and if there's any of you all who do recollect anything about this case, let us know when you're called up to the jury box. And basically, the question will be, whatever it is you may have heard about the case, does that amount of information cause you to [158] [620] already make up your mind about how you would vote if you were selected as a juror. So I don't think we're going to have a problem there.

And ladies and gentlemen, one thing that's extremely important in this case, and that is, I want you all to listen very tentatively to what the attorneys in this case have to say, because we're going to ask you all some – literally some life and death questions. And we'd ask, you know, the thirteen of you all who have been called up, you're going to be asked the questions first. And it's very highly unlikely that all of the lawyers in this case are going to agree with

you thirteen people as being our jury, so what that means, is a lot of you all are going to be called up here, and if you listen carefully to what we're saying, we won't have to repeat ourselves.

Now I can assure you that the attorneys, Ms. daPonte and Mr. Vazquez, and Mr. Olinde and myself, we are going to do – and of course Judge Hand, we're going to do everything that we can to make this as comfortable for you as possible.

We are going to do the best we can to move this along as quickly as possible.

I can assure you, this is some good news, that this isn't going to take as long to pick a jury as some cases you've heard of. We've discussed it before, we hope that [159] [621] we can get a jury seated, at the latest, by tomorrow. You know, with a little luck, maybe we can do it today. But this isn't going to be anything where we're spending hours and hours and hours asking you what kind of T.V. shows you watch, and what kind of magazines you read. We're going to get right to the point, because we certainly appreciate that you all are here. And every single one of you all saw this morning, that if you said that it would work an excessive hardship on you to be here this weekend, you could have gotten off of jury duty, and we appreciate that.

Now, ladies and gentlemen, with that, I'm going to start asking you questions, and giving you a little bit of information about the case.

The first thing I want to tell you, is that, as you know, as I've said, that the Grand Jury has indicted Allen Snyder, and Ms. daPonte will tell you, very rightfully so, that

an indictment by a Grand Jury has about the same legal effect as when you're issued a ticket, a traffic ticket, it's just a vehicle by which you get into court. You know, we're not going to go into anything more than to say that he's here, and he's been indicted, and indicted for the crime of first degree murder.

Now for those of you all who don't know, first degree murder is the most serious [160] [622] crime in the State of Louisiana, because it carries with it the potential of the death penalty.

And I'm going to ask each and every one of you all who comes up in this box about your feelings about the death penalty. And I know that there's a number of you out there who don't believe in the death penalty, and that is going to be a line of questioning that I'm going to ask, because the law says that if you all don't believe in the death penalty, and cannot impose it because of a long-standing religious, moral, or personal belief, you're not going to sit on this jury, you can go home.

And maybe I shouldn't have said that, I mean, it's a holiday weekend and all of that, and this might seem the easy thing to do, but I think all of you all have demonstrated by the very fact that you're here right now, that you take this duty, this jury duty very very seriously, and we do appreciate that.

But getting back to what I was saying, the law of the land, not only in Louisiana, but of the states that do have the death penalty, all of them recognize that in a case like this, that the jury, the people who sit on the jury must be able to say that they could consider the imposition of the death penalty. We're not asking you if you would automatically impose it, we want to [161] [623] know, we want

to get twelve people who could consider the imposition of the death penalty. And I'm going to be asking you all questions about that. And believe me, it's very difficult, difficult for me, really difficult for the defense to get up and talk to strangers they don't even know about, and ask you how you feel about the death penalty. It's difficult for me because none of you all, by your silence, have indicated you know anything about this case, and Allen Snyder, make no mistake about it, is on trial for his life. And yet, you all haven't heard a shred of evidence, and here I am up here asking you about could you impose the death penalty on that man, not having heard anything about the case. So it puts us in an uncomfortable position, but it's the only way we know how to do it. And until we think of a better way of doing it, this is the way we have to do it, so we have to make some very grand assumptions, which I will get to in just a minute.

But before I do that ladies and gentlemen, I want to very briefly discuss the law that's applicable in this case, the law of first degree murder.

But before I do that, I want to tell you all – let me see a show of hands, who's been on a jury before, who sat on a jury? Okay, good, that's about, it looks like about a fourth of you all.

[162] [624] Those of you who have been on a jury before know the way a trial works, and the way that it's going to work, is we're going to pick the jury, we're going to put on the case, we're going to argue the case, the Judge will charge the jury at the conclusion of the case as to the law that they are to apply to the evidence that they've heard, and then you go back and you deliberate.

So, Judge Hand will give you, at the conclusion of the trial, all of the law that you need to know. It will be very concise, it will be very easy to understand.

I'm going to briefly discuss with you what I understand the law of Louisiana to be, but as will be told you by Judge Hand, and certainly by myself, and certainly by the attorneys for Mr. Snyder, that what the lawyers say is not evidence.

You know, sometimes it sure looks like we want you to think that it is, but that's just the nature of the game. We're here to just try to talk to you about things, see how you feel about things, and then make an intelligent decision about who we want on this case. And then at that point we don't talk to you all any more, and more importantly, after that you can't talk to us.

So, if there's anything that – where you question yourselves about whether you'd be a good juror in this case, or if there's [163] [625] anything about the law, or anything that we discuss, if you don't understand, please ask questions.

I know surveys have shown that people are more afraid of speaking in public than they are of dying. And I'm going to help you all with that, because I'm going to call on everybody. Every single one of you all who gets up in this box is going to be talking. So you'll become more acquainted with one another, and I invite you all, as a matter of fact, I ask that you all listen very carefully.

For example, when Mr. Bennett, who is going to be the first person I'm going to talk to, because he got called up here first, when I ask him his feelings about certain things, you all listen, and it might strike something that

sounds like to you, and you know, maybe some of you all out there have never thought about whether or not you could impose the death penalty. I want you all to be listening to the answers of some of your fellow jurors, and it might make it a lot easier for you all to express your feelings. And I can assure you that it's going to make you uncomfortable, but I ask – and I know I speak for everybody here, that we ask only for your most sincere and honest responses.

Now, Mr. Bennett, I'm going to tell you a little bit about first degree murder. But [164] [626] before I do that, I want to tell you all that there is, I think, five or six, I have to count them now, grades of homicide under Louisiana law. There's first degree murder, which is the most serious; there's second degree murder; there's manslaughter; there is negligent homicide; and there's vehicular homicide, so there's five grades of homicide.

Now, vehicular homicide is when somebody is legally intoxicated, and they're in an accident and they cause somebody else's death.

Negligent homicide is a homicide where the person who did the murder is guilty of criminal negligence. Now that might be, for example, be somebody driving a car at a high rate of speed through like the French Quarter, not necessarily intoxicated, but acting criminally negligent.

Manslaughter is the killing, which would normally be murder, but it's reduced to a lesser charge of manslaughter, because the person who committed the murders, his blood, or her blood was excited, or they lost control of their ability to coolly reflect on the situation. And the law recognizes that under certain circumstances, that a murder will be reduced to a manslaughter.

Second degree murder is simply defined as the killing of a human being when the offender has a specific intent to kill or [165] [627] inflict great bodily harm.

First degree murder is the same definition as second degree murder, but the murder is committed along with another crime, or under a certain set of circumstances. For example, if you commit a murder during an armed robbery, if you rob somebody with a gun and you kill them that's first degree murder.

If there's an aggravated rape and the victim is killed, that's first degree murder.

If there's an aggravated kidnapping, somebody is taken against their will for something of value, and that person is killed, that's first degree murder.

If there is a case where somebody commits a simple robbery, and the person is killed, that's first degree murder.

Now the case that we're going to deal with in this instance, ladies and gentlemen, is first degree murder where the offender had a specific intent to kill or inflict great bodily harm upon more than one person. And that is the version of first degree murder – that's what Allen Snyder has been indicted for.

There are other forms of first degree murder which are obviously not applicable.

If someone kills a police officer in the line of duty, or a fireman.

If somebody is killed during certain [166] [628] narcotics transactions.

If somebody kills somebody for something of value, or a contract killing, that would be a first degree murder. So, there's – and there's a few others, I'm not going to waste your time going through all of them, but I say this to kind of show you the delineation between the various grades of homicide.

First degree murder is at the top, it's the only crime in the State of Louisiana that carries with it the possibility of the death penalty.

Second degree murder is, if somebody is found guilty of second degree murder, it's life imprisonment.

And for those of you all who don't already know, and this might come as a shock to some of you, under the current law of Louisiana, if someone is sentenced to life imprisonment in a murder case, that means they must spend the rest of their natural life in jail. It used to be a long time ago, that after twelve years, six months, you'd be eligible for parole. In a murder, life imprisonment, you don't get out, life is life.

The only time in a life imprisonment you might get out, is in a distribution of heroin case.

But in a murder case, life means life. So for the benefit of you all who didn't [167] [629] know that, that is a fact.

Now, Mr. Bennett, you feel like you've got an understanding of the various grades of murder?

And once again, your first degree murder is a little bit different than other crimes. Not only does it carry with it the imposition of the death penalty, but it's the only case, the only crime under Louisiana law, where the jury

decides the penalty. In every other crime, well – in every other crime that's not life in prison, the Judge is the one who hands out the penalty. But in a first degree murder, if the jury returns a verdict of guilty as charged, that same jury will come back, and they'll come back almost immediately afterwards, this won't be six months from now, it will be right after you return the verdict. I think the law now allows, I think, twelve hours between the verdict and the beginning of the penalty phase. It might be twenty four, I think it's twelve though, but it's like directly afterwards, and the same jury will make the decision on the penalty.

And at that point in the penalty phase, as it's known, the jury will make a decision, once again, based on the evidence that you hear, whether the penalty should be life imprisonment, or it should be the death penalty.

[168] [630] And currently under Louisiana law, the death penalty in Louisiana is administered through lethal injection.

So, I think you will all agree with me that we're dealing with the most serious case, and there's no question but that Allen Snyder here is on trial for his life, literally.

There's also no question but that there was – one person has been killed, and another very seriously injured, that the State has to look after. So I'm asking you all on behalf of – not only as his attorneys will do for Mr. Snyder, but I'm asking you on behalf of the victims in this case, for your very careful consideration, and for your utmost attention.

So, with that, Mr. Bennett, – and trust me on this, if you all got – anybody in the box here, any questions about the law of first degree murder? I'm going to talk to you a

little bit more about it, but I'm going to start asking the death penalty questions now.

And Mr. Bennett, let us assume, sir, and I'm basically going to ask every single one of you, worded the same way, because there's kind of – the Supreme Court has told us the way we have to do this, so I'll try not to bore you, but I'm going to say this a lot, because it's the law.

Mr. Bennett, if you are selected as a [169] [631] juror in this case, and you heard all of the evidence – now once again, we have to make this assumption, right now sir, – and I may ask from time to time, some of you questions. It's not a test, you're not graded, and there are absolutely no wrong answers.

So I'm going to put Mr. Bennett on the spot, because he looks like he'll probably be able to handle it.

Mr. Bennett, if you had to vote in this case right now, if this was the jury right here, and I had to ask you, Mr. Bennett, what's your verdict in this case as to Allen Snyder, what would it be?

MR. BENNETT: The case has already been tried, correct?

MR. WILLIAMS: No, just right now.

MR. BENNETT: I can't say, I don't know.

MR. WILLIAMS: You'd have to say not guilty, wouldn't you?

MR. BENNETT: Right.

MR. WILLIAMS: Because you haven't heard a bit of evidence.

MR. BENNETT: That's right.

[170] [632] MR. WILLIAMS: He's presumed to be innocent, and his attorneys will tell all of you all about that. As he sits here right now, he is just as innocent as you or I, because you haven't heard a thing.

But once again, for purposes of the death penalty, we have to make these assumptions, that you've heard the evidence, and you've already made a decision that he was guilty. Okay? And then you get into the penalty phase, and that's the time in the trial where you'll decide whether or not he gets life imprisonment, or the death penalty.

And once again, for your information, in a first degree murder, like in Federal Court, it has to be a unanimous verdict. All twelve people have to agree.

In all other cases, ladies and gentlemen, serious cases in the State of Louisiana, ten out of twelve people can return a verdict.

In a first degree murder it's got to be unanimous, all twelve have to agree on any verdict.

Likewise before a jury can recommend the death penalty, all twelve have to agree. If one person out of the twelve votes against the death penalty, then there's an automatic imposition of life in prison. So, to get the death penalty, all twelve have to agree. [171] [633] So, are you with me on that?

And these things, they'll all be explained to you later on by the Judge, but just for your general information, I'm telling you now.

Let us assume, sir, you get to the penalty phase, and I'll step back one more time, then I'll give you a chance to answer.

In the penalty phase, ladies and gentlemen, it is like a mini trial, it certainly won't be as long as the case in chief, but it's still a trial, it's still subject to the rules of evidence. And in the penalty phase, the State will present evidence of aggravating circumstances, and the State will likewise present evidence which will show the character and propensities of the defendant who is on trial.

The defense has the right to put on evidence of mitigation, and I'll tell you all about that. But they will try to put on evidence to show you why you should spare his life. And they can virtually put on anything they want to, and they will address that at length when they get up during their portion of the voir dire.

But that's basically the way it works, you will listen to the aggravating circumstances, you will listen to evidence about Allen Snyder, you will hear from the defense regarding mitigation. The Judge will then [172] [634] charge you as to the law, and you will make a decision. Okay?

So with that Mr. Bennett, if you are selected as a juror in this case, and you've heard all the evidence and you are convinced that he was guilty of that crime, and you got into the penalty phase, could you consider the imposition of the death penalty?

MR. BENNETT: Yes, I could.

MR. WILLIAMS: Okay. Mr. Bondi, if you are selected – Captain Bondi, all right, let's get this out, because I know they were making notes when they heard you're in N.O.P.D., they started thinking, there's no way

on earth you can be a fair juror in a case like this, and I want you to tell me whether –

MR. VAZQUEZ: Your Honor, I'm going to object. Excuse me.

I object to him saying anything that we may be thinking. I don't think that's correct. I certainly wasn't thinking that.

THE COURT: The objection is sustained.

MR. WILLIAMS: Okay. We'll see what they say.

Do you feel, – Captain, where are you assigned over there?

MR. BONDI: [173] [635] I'm the commander of the First District.

MR. WILLIAMS: Okay. You know what I'm talking about, you've dealt with it. How long have you been in N.O.P.D.?

MR. BONDI: Twenty five years.

MR. WILLIAMS: Okay. Could you be a fair juror if you're selected in this case?

MR. BONDI: Yes, sir.

MR. WILLIAMS: Do you have any knowledge about this case whatsoever?

MR. BONDI: No, sir.

MR. WILLIAMS: Do you have any acquaintances in Jefferson Parish that are such close friends of your [sic] that you think you would owe them a verdict of guilty,

or the death penalty, without having heard any evidence in the case?

MR. BONDI: No, sir.

MR. WILLIAMS: All right, the two chief investigative detectives in this case, a Detective Debbie Labit and Sergeant Norman Schultz. There was also a homicide detective Gray Thurman who was involved very, you know, [174] [636] tangentially in this case. Do you know either one of those people?

MR. BONDI: No, I do not.

MR. WILLIAMS: Okay. All right.

Now, sir, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MR. BONDI: No, I could not.

MR. WILLIAMS: Okay. Is that based upon a long-standing religious, moral, or personal belief that you have?

MR. BONDI: Yes.

MR. WILLIAMS: Okay. Which of the three, if you can identify it for us?

MR. BONDI: A religious belief.

MR. WILLIAMS: Okay. And would it be fair to say that no matter what the evidence was that you heard about Allen Snyder, that it wouldn't change your mind, that you would automatically vote against the imposition of the death penalty?

MR. BONDI: Yes, sir.

MR. WILLIAMS: [175] [637] Okay. Ms. Lebourgeois, if you were – have you understood everything that I've said so far?

MS. LEBOURGEOIS: Yes.

MR. WILLIAMS: Okay. If you were selected as a juror in this case, and you heard all the evidence, and if you've got a question, if any of you all got a question, because I'm going to kind of go a little bit faster as I get to each one of you all, stop me and I'll be happy to explain it as best I can.

If, after having heard the evidence in the case, and that's the State's evidence, and the defense, should they decide to put anything on, they don't have to, they'll tell you all about that.

If you felt the State proved its case beyond a reasonable doubt, and you were part of the jury that returned a verdict of guilty, you got to the penalty phase, could you consider the imposition of the death penalty?

MS. LEBOURGEOIS: Yes.

MR. WILLIAMS: Okay. Mr. Brooks, if you were selected as a juror in this case, – you've followed me with everything that I've said?

MR. BROOKS: Yes.

[176] [638] MR. WILLIAMS: And I truly apologize to those of you who might think I'm talking down to you, I'm not trying to do that.

Mr. Brooks, could you consider the imposition of the death penalty if you're selected as a juror?

MR. BROOKS: Yes.

MR. WILLIAMS: Okay. Mr. Brown, could you consider the imposition of the death penalty if you're selected as a juror in this case?

MR. BROWN: Yes.

MR. WILLIAMS: Ms. Boudreaux, if you are selected as a juror in this case, and you found yourself having been convinced that the State proved its case, and he was guilty of the first degree murder, could you consider the imposition of the death penalty?

MS. BOUDREAUX: I have to state it would be one of the most difficult things I would have to do.

MR. WILLIAMS: Without a doubt, ma'am.

MS. BOUDREAUX: But, yes.

MR. WILLIAMS: Okay. Now, I'm going to stop right here, and not to steal their thunder, but [177] [639] when Ms. daPonte and Mr. Vazquez stand up here, they're going to ask you a similar question. Those of you all who have said that you could consider the imposition of the death penalty, they're going to ask you Would you automatically impose the death penalty, without any consideration of life imprisonment. And if there are any of you all who feel that way, and I know that there are out there, if there are those of you who feel that the only appropriate penalty for murder is death, you're going to get to go home too, because it cuts both ways.

If there are people that could never do it, they won't sit on this case, and if there are people who would automatically do it in every instance, without regard to the

evidence, they'll be excused likewise. That's why you'll hear me always say the word Consider. And that means could you consider the death penalty, and the flip side of that is, could you likewise consider life imprisonment.

So I'm going to – is there anybody here in the first row who would automatically impose the death penalty, who's already stated – okay, all right.

I will let the defense ask you about this. Ms. Boudreaux, you could consider both?

MS. BOUDREAUX: Yes, I could.

[178] [640] MR. WILLIAMS: Okay. Mr. Bourgeois, if you were selected as a juror in this case, sir, could you consider the imposition of the death penalty?

MR. BOURGEOIS: Yes.

MR. WILLIAMS: Ms. Braud, could you, ma'am?

MS. BRAUD: Yes, sir.

MR. WILLIAMS: Mr. Lewis, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MR. LEWIS: Yes, sir.

MR. WILLIAMS: All right, Ms. – is it Lovell or –

MS. LOVELL: Lovell.

THE COURT: Ms. Lovell, could you consider the imposition of the death penalty if you were selected?

MS. LOVELL: Yes sir, I could.

MR. WILLIAMS: Mr. Burns, could you consider the imposition of the death penalty?

MR. BURNS: Yes, I could.

[179] [641] MR. WILLIAMS: Okay. Let's see, Ms. Remand, if you were – Remond, I beg your pardon. I believe your husband is a Sheriff's Deputy, is that correct?

MS. REMOND: That's correct.

MR. WILLIAMS: Okay. And you said he was detailed to the School Board?

MS. REMOND: He's detailed with the school intervention program.

MR. WILLIAMS: Oh, I see. Okay.

All right, I'm going to ask you all, after I finish this round, a round of questions of some other things, and one of them will be about your relationship with law enforcement.

Ms. Remond, if you were selected as a juror in this case, ma'am, could you consider the imposition of the death penalty?

MS. REMOND: Yes, I could.

MR. WILLIAMS: Okay. And Ms. Clerk, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MS. CLERK: [180] [642] No. A religious belief.

MR. WILLIAMS: Okay. All right.

I have to kind of back up and ask you, and I understand you said your reservations against the death penalty are based upon long-standing religious beliefs?

MS. CLERK: Yes.

MR. WILLIAMS: All right. As I asked Captain Bondi, do you feel that there's any set of facts, or any evidence, anything that you hear about Allen Snyder that would cause you to change your mind?

MS. CLERK: No.

MR. WILLIAMS: Okay. So no matter what the evidence is in this trial, just imagine the worst possible case scenario, because of your long-standing religious belief, you would automatically vote against the imposition of the death penalty?

MS. CLERK: Correct.

MR. WILLIAMS: Thank you Ms. Clerk. Okay.

Now, one of the things – we've got that out of the way. See, that didn't take long at all.

There are some misconceptions regarding [181] [643] murder cases that I want to discuss with you. There are a lot of people who believe that premeditation is something that has to be proven in a murder case. Well, it doesn't. For those of you all who have, through television, or reading, become of the belief that the State has to prove premeditation, a long planned out affair before you could the – before you could consider a verdict, a guilty verdict in a first or second degree murder. That's not quite correct.

The State does not, at any time, in any case, have to prove premeditation.

If you'll listen carefully to what the definition of murder is, it's the killing of a human being where the offender has a specific intent to kill or to inflict great bodily harm. So the key words are "Specific intent".

What has to be shown, ladies and gentlemen, is that the offender, the person who did the crime, has to have actively desired the consequences of his or her action. In other words, it wasn't an accident. It's not the accidental killing of somebody, it's the intentional killing of somebody, and I'm going to – I'm looking for Walter Floyd, because I always use him as my example, but I don't see him here.

I'm going to give you a kind of a little example that I've always used in every [182] [644] homicide case that I've ever tried, to illustrate specific intent.

Let us suppose that you all, you're looking at me, you don't know me, other than me speaking to you today, and you see me walk over here by Mr. Olinde, and you see me produce a revolver from the back of my jacket, and point it right in his chest and pull the trigger and shot him. Now, I think that all of you all would agree with me, that based upon my actions, you'd have to believe that I had a specific intent, I actively desired either to kill him, or to inflict great bodily harm upon him.

Let me give you another example. Suppose I'm out somewhere hunting out in the country in South Louisiana, I've got my rifle and I'm hunting for say rabbit or something like that, whatever's in season, and I see something that I believe is what I'm looking for in the bushes, I think it's a rabbit, and I shot over in the bushes where I see the jumping around, and I go over and find it's Mr. Olinde. God knows what he's doing in the bushes out there, but I shot him, accidentally, not knowing it was him. I think it's

very apparent from that example that I certainly didn't intend to kill him. It could be said that I was criminally negligent, or it was an accident, it's not an intentional killing. I know these examples are, you know, kind of silly, [183] [645] but I think they illustrate the point. And that point is, there's no such thing as premeditation.

The law of Louisiana, and the Judge will charge you, is that specific intent can be formed in an instant prior to the actual killing. It doesn't have to be something that's thought out, planned out, or anything like that. All that has to be shown, is that at the time of the killing the offender had a specific intent, an active desire to do what was done.

Are there any of you all seated in the box who have a question about that?

Are there any of you all, and if you don't raise your hands I'm going to start calling on you. Are there any of you all who feel that because, in a case like this that has the death penalty, that the State would have to prove that there was premeditation?

Let's see, Ms. Remond, how do you feel about that? Are you comfortable with the law as I've given it to you?

MS. REMOND: Yes, I am.

MR. WILLIAMS: That what the State must prove, is at the time of the crime, whether the intent was formed the second before the act happened, or it was formed a week before, or a month before, it has to be shown only that [184] [646] the offender actively desired the consequences of his action?

MS. REMOND: That's correct, yes.

MR. WILLIAMS: Okay. Ms. Lovell, how do you feel about that?

MS. LOVELL: It's quite clear to me.

MR. WILLIAMS: Very good. All right.

Now, let's talk about something else that you all heard a lot about.

In this case, Allen Snyder's plea – when you come to court in any case, whether it's a misdemeanor or a first degree murder, you come before the court and you enter your plea.

In this case Allen Snyder's plea has been not guilty, and not guilty by reason of insanity. That's the plea that he has before the Court right now.

Now I hear a little moan out there, and all of you all have got your own ideas about what you think an insanity defense is, you've seen a lot about it. I am going to tell you very simply, that under the law of Louisiana, if a defendant pleads not guilty, and not guilty by reason of insanity, the burden of proof shifts to them.

In virtually every other instant, the State has to prove everything, we have to [185] [647] prove that there was a murder, we have to prove that he did it, we have to prove that it occurred in Jefferson Parish, we have to prove that there was an intent to kill or inflict great bodily harm upon more than one person, we have to prove all of those things beyond a reasonable doubt, which is something I know you've all heard before. I'll talk about that in a second, briefly.

However, when a defendant comes in – and you know what else, if the defendant had a defense of alibi, that he wasn't there, the State has to disprove the alibi, because we've got to prove identity.

If the defense comes up with a defense of self-defense, we have to disprove that.

But, in a case where the defense enters a plea of not guilty, and not guilty by reason of insanity, the burden shifts to them, they have to prove to the jury, by a different burden of proof.

I'm throwing a lot of stuff at you. I'm going to answer your questions if you have any, but they have to prove by a preponderance of the evidence, which is defined as more likely than not that he was insane at the time of the event.

So with that, we'll talk about that, because I'm going to ask you all how you feel about this.

Under Louisiana law, and it's about the simplest thing that there is, the insanity [186] [648] defense – do you know what that means? That means that at the time of the commission of the crime, the perpetrator did not know the difference between right from wrong. That's it, period.

MS. daPONTE: Judge, I'm going to object. There is a little bit more to it than that.

MR. WILLIAMS: Well, if I could be allowed to continue, I'm going to explain everything to the jury, and they can voir dire too.

Technically Ms. daPonte is right, it must be shown that there is a mental defect, that the defendant suffers from some sort of mental defect that rendered him or her unable to tell the difference between right from wrong.

And who decides whether or not somebody knows the difference between right and wrong? The jury, that's who decides. You all, whoever it is, the thirteen, fourteen, twelve people that sit on this case, there's no formula, there's no mathematically formula, there's no light that goes off; you're going to hear evidence, and the twelve people that sit on this case will decide, based upon your own good common sense and your common experiences, do you believe that at the time of the commission of this crime, that the defendant didn't know the difference between right and wrong.

[187] [649] That's basically what we're talking about.

Now I know there's a lot of you, and I'm going to ask you all here, just say I don't believe that, I think it's an excuse, I think it's a cop-out, how could somebody do a certain thing and not know that – I just don't believe it, I think it's a trumped-up defense.

Well, ladies and gentlemen, a couple of things about that. You don't have to believe it, it's a defense. But what you have to do, and what the defense is going to ask you to do, is to be able to listen to the evidence.

They're going to, perhaps, call witnesses, I don't know, don't know what they're going to do, I'm not going to pretend to. But they're going to ask you how you feel about the insanity defense.

And what I need to know, and what they need to know as well, and I'm sure they'll ask you this, is could you

listen to the evidence before you make a decision about the validity of that defense?

If there are those of you who feel that I – you say insanity, I say that's an excuse, I say he's guilty. If you feel like that, guess what, you won't be on this case. But if you tell us, Mr. D.A., Ms. Defense Attorney, Mr. Defense Attorney, I'm going to listen to all the evidence before I make up [188] [650] my mind on anything. I'm going to listen to what everybody in this case that sits in that chair has to say, and then I'll go back with my fellow jurors, and we'll sort it all out. That will be just fine.

So are you all with me on that? Okay. Anybody got any questions? And I know I sound like I'm talking to school kids some times, but there's kind of a lot that I'm throwing at you.

Let me give you an example that I often use in cases like this one, there is a claim of not guilty by reason of insanity. What I'm thinking, and what I'd suggest to the jurors that they think, would this defendant have committed this crime if there was a uniform policeman standing right next to him at the time the crime was committed. And if from the evidence that you hear, you feel that he would have committed this crime if there had been a uniform police officer standing right there, then I guess you've got to believe that he was crazy and didn't know the difference between right from wrong.

And anything short of that, ladies and gentlemen, I'll suggest to you, and it's up to you, is not insanity. Okay? But that's a decision that the jury makes.

Now, let's see, Ms. Remond, do you feel, ma'am, if you were selected as a juror in this case, that you could listen,

and that's [189] [651] all you have to do, listen to the evidence regarding the insanity plea, and listen to all the evidence, and then make your decision at the conclusion of hearing all the evidence?

MS. REMOND: I would have to listen to all the evidence first.

MR. WILLIAMS: Right. Mr. – correct.

Mr. Burns, how about your [sic], sir?

MR. BURNS: I'd listen to the evidence.

MR. WILLIAMS: Ms. Lovell?

MS. LOVELL: Innocent until proven guilty.

MR. WILLIAMS: Mr. Lewis?

MS. LEWIS: I would have to listen to the evidence.

MR. WILLIAMS: Ms. Braud?

MS. BRAUD: I'd listen to the evidence.

MR. WILLIAMS: Mr. Bourgeois:

MS. [sic] BOURGEOIS: I'd listen to the evidence.

MR. WILLIAMS: Mr. Bennett?

MR. BENNETT: [190] [652] I'd listen to the evidence.

MR. WILLIAMS: Ms. Lebourgeois?

MS. LEBOURGEOIS: I'd listen to the evidence.

MR. WILLIAMS: Mr. Brooks?

MR. BROOKS: I would listen.

MR. WILLIAMS: Very good.

Let's see, Mr. Brown, how about you, sir?

MR. BROWN: I kind of think it's a little ridiculous myself, and I don't find that personally to be, you know, –

MR. WILLIAMS: Okay. A lot of people feel exactly the same that you do. However, the bottom line question on this, you know, it may very well be that you could hear somebody say that, you know, they were in a satellite orbiting the earth at the time of the commission of the crime, and if you hear that without having heard the other evidence, that sounds ridiculous too. But if that was their defense, the law of the land allows them to put it on, they can put on any kind of defense they want to. And what's expected of the jurors, that they'll listen to all of the evidence before they decide.

[191] [653] Do you feel that you could listen to all of the evidence in the case, or –

MR. BROWN: I'd have to listen to the evidence, before –

MR. WILLIAMS: Okay. Then that's, that's – trust me, I'm not asking, you know, – really, what you feel about the insanity defense is really not relevant. What's relevant, is could you listen to the evidence, all of the evidence, who was there, the doctors, the police officers, everybody, before you make up your mind.

Could you do that, sir?

MR. BURNS: Yeah, before I make up my mind whether he's guilty or not guilty, eventually.

MR. WILLIAMS: That's all we can ask. Okay.

I'm moving right along, just a few more minutes. I'm going to ask you all some questions –

MR. VAZQUEZ: Jim, –

MS. daPONTE: Jim.

MR. VAZQUEZ: – she has a question.

MR. WILLIAMS: Yes ma'am, I'm sorry.

MS. BOUDREAUX: [192] [654] I don't think you addressed me for that, that question.

MR. WILLIAMS: Oh, I'm sorry, I certainly didn't.

MS. BOUDREAUX: No, I could not.

MR. WILLIAMS: You could not even consider it?

MS. BOUDREAUX: No.

MR. WILLIAMS: If you had evidence, and I'm not suggesting that any of this is evidence, I have no idea what they're going to say, but somebody was institutionalized, and then broke out of an institution, he'd been there for life, and they committed, let's say, not a murder, but let's say a robbery, and that they, you know, kind of stood there waiting for the police to come, and got caught, and you had a slew of doctors come in and say this guy is crazy as a loon, he has no idea what he's doing, that's why he's locked up and not allowed to be out. Would that be a situation where you could consider the insanity defense?

In other words, can you envision a set of circumstances where somebody could be legally insane and not know what they're doing?

MS. BOUDREAUX: No, no, not when it comes to killing somebody.

[193] [655] MR. WILLIAMS: Okay, okay. I appreciate that.

Okay. Now is there anybody else that feels as Ms. Boudreaux does?

Okay. Very good.

Now, ladies and gentlemen, the next question I want to ask you about is about your understanding of the burden of proof here.

As I said before, the State of Louisiana bears the burden of proving each and every element alleged, except the insanity defense, beyond a reasonable doubt, and that's a term I know you've all heard, I'm not even going to attempt to try to tell you what I think it is. I'll submit to you that it's your own good common sense. And if you have a doubt about any element of the State's case, and you can give a reason for it, only to yourself, you don't have to convince anybody else, but if you can give a reason why you have a doubt, then that is a reasonable doubt, and I'll leave it at that.

One thing that I will submit to you ladies and gentlemen, and ask you about, – let's see, Mr. Lewis, would you agree with me, sir, and this is in fact the law, that beyond a reasonable doubt doesn't mean that you can consider prejudice or sympathy or bias or any of those things in

making your decision in a case, you have to go by the [194] [656] facts.

Do you agree with that, sir?

MR. LEWIS: Yes, sir.

MR. WILLIAMS: In other words, let's say for example you've got a situation where a poor lady who's got a lot of children, shoplifts some milk from a Time Saver because she has no money, and she has to take care of her kids. Obviously, you know, I could make a lot of scenarios like that, and there would be a great deal of sympathy involved in the case. More than one defense attorney has defended their client, and pleading for mercy and for sympathy. That has no place in a court of law. It may sound cold, but you're supposed to go by the facts.

Do you understand that? And would you keep your consideration, in this particular case, to the law and the evidence, and not let sympathy or prejudice or bias enter into your deliberation?

MR. LEWIS: That would be your duty as a jury.

MR. WILLIAMS: That's exactly correct.

Ms. Braud, could you make the same promise to me?

MS. BRAUD: Yes.

MR. WILLIAMS: [195] [657] Mr. Bourgeois, could you make that promise? Is there anybody that could not make that promise to me? Okay.

Now, how many of you all have ever, in here, been on a jury before?

Let's see, start with the first row, Mr. Brown, what kind of case was it?

MR. BROWN: It was an armed robbery –

MR. WILLIAMS: Civil or – armed robbery. Was that here in Jefferson Parish?

MR. BROWN: Yes, sir.

MR. WILLIAMS: How long ago was that?

MR. BROWN: I think about ten years ago.

MR. WILLIAMS: Okay. And do you remember the verdict of the jury?

MR. BROWN: It was guilty.

MR. WILLIAMS: Okay. In that case did the defendant testify?

MR. BROWN: No, no sir, he didn't.

MR. WILLIAMS: Okay. Any other cases Mr. Brown? Okay. Back row, Ms. Remond?

MS. REMOND: [196] [658] I served on a grand jury.

MR. WILLIAMS: Okay.

MS. REMOND: About three years ago.

MR. WILLIAMS: Jefferson Parish Grand Jury?

MS. REMOND: That's correct.

MR. WILLIAMS: Okay. Okay, who else on the back row? Mr. Burns?

MR. BURNS: It was an aggravated crime against nature about fifteen years ago.

MR. WILLIAMS: Okay. And do you remember the verdict of the jury?

MR. BURNS: And the verdict was guilty.

MR. WILLIAMS: All right. Were you the foreperson on that jury?

MR. BURNS: I was not.

MR. WILLIAMS: Okay. Anybody else? Okay.

Are there any of you all who have personally been the victims of a violent crime, or have any very close friends or relatives who have been the victims of a violent crime, and how the fact that it [197] [659] happened to a close friend or relative touched your life?

And if it's something that's really really bad, and you'd rather not say it in front of everybody, I understand that, and I'm not asking you to do that. The purpose of my question is to find out if there are any of you all who find yourselves in that situation, and you might want to get even as a juror in a case like this.

So, in the first row, are there any of you all who have personally been the victim of a violent crime, or have any close friends or relatives that have been? Okay.

In the back row, is there anybody in that situation? All right.

Now, let's see, there have been, let's see, Ms. Remond, Captain Bondi, and let's see who else has – Ms. Clerk,

your husband works for the Jefferson Parish Sheriff's Office as a crossing guard, correct ma'am?

Okay. Let me ask this question about law enforcement. We're going to call a number of witnesses, actually, let me tell you now so you can gauge about how long this trial is going to last, because as you already know from this morning, once you're sworn in as a juror, you're stuck, you don't get to go home, you don't get to live your life as you normally would, you're kind of like under lock and key. Not really, because I know from experience that what [198] [660] this Court will do, is try to make it as you know, I guess, tolerable as is humanly possible. We're going to work hard, we're going to work as late as the jury wants to work, so that we can get this case decided as quickly as possible. When I say that, I don't mean to say that we're going to rush through this thing, because of the nature of the case, we're not going to do that, we're just going to try to work hard. And based upon my knowledge of the case, if things go really really well, we're hoping that this case will be over by the weekend, by Saturday at the latest. You never can tell, but we're working really really hard, and maybe there's an outside chance of Friday, but that's kind of stretching it. We're pushing hard for Saturday. So that gives you my best guess of how long I think this case is going to last. And the reason I said that, the State plans to call about fifteen witnesses.

I don't know how many witnesses the defense has, they'll talk to you about that if they choose. But, we're going to work hard.

Now, my question, I kind of got away from it, but it's about law enforcement. I need to know from the thirteen of you all who are seated here in the jury box, are there any

of you all who have ever called on any member of law enforcement for assistance [199] [661] at any time in your adult lives, for any reason, whether it was a disturbance in the neighborhood, a car theft, anything that you've ever called 911, or called on any law enforcement for assistance; by a show of hands?

Okay, that's almost everybody.

Now, those of you all who have raised your hands, were you all essentially satisfied by the way in which law enforcement responded to your call for assistance, outside of maybe the time element. But, is everybody basically okay?

Ladies and gentlemen, that's about it, I'm going to sit down now.

I want to know, and this is going to be the last time that I get to talk to the thirteen of you all, if there's anything that I've said that you have a question in your mind about – there's a lot of other things that I could talk about, but this is the way I choose to do it, I try to get straight to the point.

Any question about anything that I've said that anybody has at this point? Okay. My final question, Mr. Bennett, if you were selected as a juror in this case, sir, and you heard all the evidence in the case, and you were convinced beyond a reasonable doubt in your own mind that Allen Snyder committed the murder, committed the murder of, I should say, I haven't said yet, that [200] [662] the victim's name in this case is Howard Wilson, Jr., and the other victim who survived and who will testify, her name is Mary Snyder, it's his wife.

Are there – Mr. Bennett, if the State proves beyond a reasonable doubt that he's guilty of that crime, what would your verdict be?

MR. BENNETT: Guilty.

MR. WILLIAMS: Ms. Lebourgeois, what would your verdict be?

MS. LEBOURGEOIS: Guilty.

MR. WILLIAMS: Mr. Brooks, what would your verdict be?

MR. BROOKS: Guilty.

MR. WILLIAMS: Mr. Brown?

MR. BROWN: Guilty.

MR. WILLIAMS: Ms. Remond?

MS. REMOND: Guilty.

MR. WILLIAMS: Mr. Burns?

MR. BURNS: Guilty.

MR. WILLIAMS: [201] [663] Ms. Lovell?

MS. LOVELL: Guilty.

MR. WILLIAMS: Mr. Lewis?

MR. LEWIS: Guilty.

MR. WILLIAMS: Ms. Braud?

MS. BRAUD: Guilty.

MR. WILLIAMS: Mr. Bourgeois?

MR. BOURGEOIS: Guilty.

MR. WILLIAMS: Thank you very much.

Tender the panel.

MS. daPONTE: Good afternoon ladies and gentlemen, good afternoon. I'm going to try to keep my voice up as loud as Mr. Williams did, I don't know if I'll be able to do that.

Can everybody in the back hear me okay? Okay.

The first thing I want to do is introduce you to the most important person in this courtroom, and that is Allen Snyder. This trial is about him, and I need all of you all to make sure that this trial is about nothing else.

We're going to go into that a little [202] [664] bit. Mr. Williams talked about sympathy and things like that, I have a couple of more things that I want to add to that, because this trial is about Allen Snyder and whether or not he committed the crime of first degree murder, and that's all it's about.

I'm Graham daPonte, I have the honor of representing Allen Snyder, along with Casear [sic] Vazquez.

I'm going to be asking you some questions first, and then because this is a death penalty case, Mr. Vazquez is going to get up and talk to you about your feelings about the death penalty.

My job right now is to talk to you about your feelings about the rest of the case, because there's a lot more to this case than just whether it's a death penalty case.

And there is a lot more to this case than whether this is an insanity defense.

I'm going to start out by saying there are two pleas here, not guilty, and not guilty by reason of insanity.

We're the lawyers, Mr. Vazquez and I are the lawyers here, we've gone to law school, Mr. Snyder acquired us because we have experience in the law, and like most of you all, he doesn't, and he's relying on our knowledge, and on our experience, and on our expertise. We make the legal decisions here.

And let me ask you, Mr. Brown, I heard [203] [665] you voice what I'm anticipating a lot of you will voice, the opinion that the insanity defense is ridiculous.

And Ms. Boudreaux can't even consider it, and you may feel the same way. And Mr. Williams asked you could you listen to the evidence; I'd like to ask you, could you consider that someone may be suffering from a mental disease or defect which would make them unable to determine right from wrong.

MR. BROWN: I don't believe that at all.

MS. daPONTE: You couldn't consider that.

And I think that's valid, and I appreciate you being honest and telling me that.

So I'm going to move to Mr. Brooks. My decision was to enter that plea on Allen's behalf. If you're going to hold that against anybody, can you hold it against me and not against Allen?

MR. BROOKS: The final decision is his, isn't it?

MS. daPONTE: In a trial, the final decision on certain things is his, but the legal decisions are made by his lawyer.

Can everybody understand that Allen Snyder didn't go to law school, he doesn't practice law, and the technical, legal decisions that are made in this case are [204] [666] going to be made by me and by Mr. Vazquez.

I see you nodding Mr. Bennett, can you understand that?

MR. BENNETT: I can understand that.

MS. daPONTE: If you hire a lawyer, if you have a lawyer representing you for something, would you feel that that lawyer was the person with the knowledge?

MR. BENNETT: He's the one that has the knowledge, that's the reason I hired him.

MS. daPONTE: That's why you got him?

MR. BENNETT: That's why I got him.

MS. daPONTE: What do you think about that?

MR. BROWN: I mean, I wouldn't want to lay that responsibility on you.

MS. daPONTE: Okay. And I'm not sure I understand your answer.

MR. BROWN: What I mean is, if he's pleaded insanity, I would think that that was –

MS. daPONTE: It was his idea. Okay?

And if you decide that you didn't like the fact that he pled insanity, would you [205] [667] hold it against him for having done that, or would you look at me?

MR. BROWN: I would not hold that against him.

MS. daPONTE: Okay, all right. And that's a fair answer.

What I'm asking everybody right now, is can you understand that there are decisions that are going to be made in this trial, and things that are going to happen in this trial?

I'll give you another example. A lot of jurors absolutely hate it when an attorney jumps up and says objection, and then we all run to the Bench and we all talk to the Judge, and we whisper about stuff, because they think, what are you trying to hide.

Can you all understand that if Mr. Vazquez or I make some objection, there's a legal reason for it.

You're nodding Ms. Braud, you can live with that?

MS. BRAUD: Yes.

MS. daPONTE: And there are other legal decisions that we may make that you all may not like. Can you live with that and not hold that against Allen?

Mr. Burns?

MR. BURNS: [206] [668] Yes, I can.

MS. daPONTE: And Ms. Lovell?

MS. LOVELL: Yes.

MS. daPONTE: Everybody understands what I'm getting at?

I'm going to ask you all to be as candid as possible, just like Mr. Williams did, and as verbal as possible. I'm very impressed with the way that you talked when you were spoken to, and I'd just ask that you do the same thing with me.

And if there is anything that you know in your heart is going to prevent you from being a fair juror, and I don't read your mind, and I ask you, please, I'm asking you from my heart to tell me what it is. Okay? Thank you.

Ms. Remond?

MS. REMOND: Remond.

MS. daPONTE: Remond. All right, Ms. Remond you sat on a Grand Jury?

MS. REMOND: Yes.

MS. daPONTE: So you understand that a Grand Jury really is nothing more than a vehicle by which to get something into court, right?

[207] [669] MS. REMOND: That's exactly right.

MS. daPONTE: Who did you hear from when you sat on the Grand Jury? Did you ever – did you ever hear from any defense witnesses?

MS. REMOND: No.

MS. daPONTE: Did you ever see a defense attorney it there?

MS. REMOND: No.

MS. daPONTE: Because they're not allowed.

MS. REMOND: That's right.

MS. daPONTE: Does everybody know that? Does everybody know – when Mr. Williams stands up and says, A Grand Jury indicted Allen Snyder; and then he says, Oh, the Grand Jury is just like a traffic ticket; and then you think, Oh yeah, right, a Grand Jury is just like a traffic ticket.

Well, it really is, because the Grand Jury hears from the prosecutor, and that's all. And defense attorneys are not even allowed in there, we don't even know when the Grand Jury is going to meet to talk about indicting our client.

So there are a whole range of things [208] [670] that the Grand Jury – well, that a petit jury, a small jury, could do with a case that a Grand Jury is not going to know anything about. A Grand Jury is not going to hear any defense. They're not going to hear about lesser responsive verdict.

Mr. Williams talked about the five grades of homicide. In this case there are three responsive verdicts to first degree murder, and that is Not guilty, Guilty of manslaughter, and guilty of second degree murder.

The Grand Jury doesn't hear the evidence that might make them say, you know, this sounds like a manslaughter to me.

If we're going to indict somebody, maybe we should indict him for manslaughter. They don't hear that.

So, would everybody agree that not every indictment by a Grand Jury is necessarily going to be right? Can everybody go along with that?

And likewise, can everyone agree that not every charge that a Grand Jury brings down is necessarily the right charge, necessarily reflects what actually happened. Can everybody agree with that?

Mr. Bennett, did you know that about the Grand Jury?

MR. BENNETT: Not until now, no.

MS. daPONTE: [209] [671] Is anybody on the panel a neighborhood watch member? Anybody – yes ma'am, Ms. Braud, you're on the neighborhood watch?

MS. BRAUD: We joined, my husband and I, several years ago.

MS. daPONTE: And does anybody have – we know about Ms. Remond, does anybody have any friends or family who are members of either the Police Department, the Sheriff's Office, the District Attorney's Office, the U.S. Attorney's Office, Marshall's Office, anybody in law enforcement?

We'll take the first row. Yes, and Ms. LeBourgeois?

MS. LEBOURGEOIS: Yes.

MS. daPONTE: Who do you know?

MS. LEBOURGEOIS: Several N.O.P.D. policemen in the Third District.

MS. daPONTE: Okay. Friends or family?

MS. LEBOURGEOIS: Very close friends.

I had a very close friend that was on the Jefferson Parish Police Department, that recently committed suicide last year.

I have a friend that is on – that is an assistant D.A., I think New Orleans, I'm not [210] [672] really sure where he is now.

MS. daPONTE: So you've had a lot of friends in law enforcement?

MS. LEBOURGEOIS: Uh huh.

MS. daPONTE: Would that effect you in any way in your being a fair juror?

MS. LEBOURGEOIS: I don't think so. I don't think so.

MS. daPONTE Let me ask you this. Let's say you listen to the case and you decided that the State hasn't proved their case, and you found Allen not guilty, or you found him not guilty by reason of insanity, or you found him guilty of a lesser verdict like manslaughter, –

MS. LEBOURGEOIS: Uh huh.

MS. daPONTE: – do you think that you'd have a tough time telling your friends that are on the police department about that?

MS. LEBOURGEOIS: Uh uh, no.

MS. daPONTE: You're sitting next to Captain Bondi, so we all know that police officers have varying ideas about what's justice, –

MS. LEBOURGEOIS: [211] [673] Right.

MS. daPONTE: – whether they would consider the death penalty or not.

Do you feel like those friends that you know on the police department are going to insist that you find people guilty even if they're not guilty?

MS. LEBOURGEOIS: No, I don't think so.

MS. daPONTE: Anybody else have any friends or family? Mr. Brown, you have friends or family in law enforcement?

MR. BROWN: I have a couple of friends on the Jefferson Parish Police Department.

MS. daPONTE: Anybody else in the back row? Mr. Bourgeois?

MR. BOURGEOIS: I went to school with Jack Capella.

MS. daPONTE: You went to school with Jack. And how does that – how is that going to effect the way that you view this case?

MR. BOURGEOIS: Not at all.

MS. daPONTE: Not at all. Do you see Mr. Capella on a regular basis?

MR. BOURGEOIS: [212] [674] I haven't seen him in about ten years or more.

MS. daPONTE: Okay. If you saw him at a class reunion and you told him that you sat on one of his cases,

and you found the defendant not guilty, would you be embarrassed about that?

MR. BOURGEOIS: Not at all.

MS. daPONTE: Anybody else?

Mr. Lewis?

MR. LEWIS: I've got casual friends that are with the Jefferson Parish Sheriff's Office.

MS. daPONTE: Okay.

MR. LEWIS: And neighbors in my neighborhood that are with the J.P.S.O., and Gretna City Hall.

MS. daPONTE: Anybody such a close friend that you think it might influence –

MR. LEWIS: No.

MS. daPONTE: – your decision?

Anybody else?

Ms. Remond, you're married to a Sheriff's Deputy?

MS. REMOND: Yes.

[213] [675] MS. daPONTE: What effect, if any, do you think that might have on your ability to be fair?

MS. REMOND: I don't think that would have any effect. I'd have to hear the evidence first.

MS. daPONTE: Anybody either been in the military, or have close family members who have been in the military? Front row.

Mr. Bennett, what branch?

MR. BENNETT: Navy.

MS. daPONTE: Navy. And what was your rank – how long were you there, first?

MR. BENNETT: Four years active duty, I was an airmen.

MS. daPONTE: You were an airmen. All right.

And when was that?

MR. BENNETT: I'm sorry?

MS. daPONTE: When did you serve?

MR. BENNETT: '76 to '80.

MS. daPONTE: Mr. Bondi?

MR. BONDI: Yes, if we had relatives in the [214] [676] military?

MS. daPONTE: Yes.

MR. BONDI: I have a brother who's in the Coast Guard Reserve.

MS. daPONTE: Mr. Brooks?

MR. BROOKS: My brother is in the Army Reserve, Army Reserves.

MS. daPONTE: Anyone in the back row?

Ms. Remond?

MS. REMOND: I was in the Army.

MS. daPONTE: You were in the Army?

MS. REMOND: Yes.

MS. daPONTE: How long?

MS. REMOND: Two years.

MS. daPONTE: And what was your rank?

MS. REMOND: Chief Private First Class.

MS. daPONTE: And when was that Ms. Remond?

MS. REMOND: Oh, that tells my age.

[215] [677] MS. daPONTE: Oh, I'm sorry. Not really.

MS. REMOND: Back in the mid 60s.

MS. daPONTE: That's fine. Real early.

And Ms. Clerk?

MS. CLERK: A brother and a sister; U.S. Army.

MS. daPONTE: In the Army?

MS. CLERK: Yes.

MS. daPONTE: Are they career officers?

MS. CLERK: Sergeants.

MS. daPONTE: Sergeants. And anybody else in the back row?

MS. LOVELL: My father was a Master Sergeant in the Marine Corps, World War II, and Korea.

MS. daPONTE: Yes, sir.

MR. LEWIS: My father was a Marine in World War II, and one of my older brothers was an Army Officer during Vietnam.

MS. LEBOURGEOIS: My father was in the National Guard, but I don't know how long, or when, or what he [216] [678] did.

MS. daPONTE: You know he was there. Did he used to go on deployment with fatigues and –

MS. LEBOURGEOIS: I don't know.

MS. daPONTE: okay.

MS. LEBOURGEOIS: He was long out of that by the time I was born.

MS. daPONTE: I'm going to talk to you a little bit about something that – well, I guess I'm going to get into a little bit of the special issues in this case, that I need to find out how you feel about it.

First of all, Mr. Williams talked to you about the possibility that you might have heard or read something about the case. There is also the possibility that there's going to be some publicity surrounding this trial. There may or may not be. You may have some television cameras outside on your way to lunch, on your way out of court during the evening, and – probably not on your way to court in the morning.

But I need to know from you if that's going to make you think any differently about the evidence in this case. The fact that the press is interested in it, or might be interested in it, is that going to make [217] [679] you any more likely to think that Mr. Snyder is guilty?

How about you, Mr. Brown?

MR. BROWN: No.

MS. daPONTE: And is it going to intimidate you at all, the fact that you might be filmed going to lunch? Anybody feel like, Boy, I guess I'd really owe it to my neighborhood to make sure I come back with a guilty verdict, because, you know, they know I'm a juror in this high profile case. Anybody feel that way? Anybody going to be at all intimidated by that?

Your job in this case, as Mr. Williams said, is really to put on blinders, and make sure that none of that extrinsic evidence gets in. You're supposed to make a very intellectual, and not at all emotional decisions. The job of the jury really is to decide what happened. What happened, the facts, and you do that by listening to the witnesses on the witness stand, and judging their credibility.

You're going to hear from police officers, you're going to hear from what's called expert witnesses, and you're going to hear from lay witnesses just like you and me, although, you know, some of you all may have some expertise that would qualify you as an expert in some things.

[218] [680] An expert is someone who has special qualifications which render them able to give an opinion about a certain field of expertise.

And just like any other witness, you can take them or leave them. You can decide whether you believe what they're telling you or not, you use your own common sense, nobody is going to give you a formula to figure out who's telling the truth. So that's one of your jobs, judge the

credibility of the witnesses, in order to determine what happened.

And in order to determine the facts of the case, – or once you're determined the facts of the case, then you'll be asked to decide whether the facts of the case fit the law that the Judge gives you, whether – once you've decided what happened, once it's in your mind what happened, then you have to decide whether the elements of the crime have been met. So you are the judges of the law, to a certain extent. Everybody always says the jurors are the judge of the facts, but you also have to judge the law, you have to decide whether in fact they've met their burden, the State has met their burden of proving all the elements to you.

Can everybody – everybody understands what your job is?

And would you agree with me that your job in determining the facts, is to be [219] [681] completely intellectual. This is what happened. And let me give you an example. Let's say this is a robbery case, and the victim is a very frail elderly woman on her way to church, and the defendant was on trial, and the State didn't prove to you that the defendant was anywhere near that woman, but here she is, and she's pathetic, and she's very old, and she's very frail. Would everyone agree that you couldn't find somebody guilty because you feel sorry for the victim. Everybody agree with that? All right.

And likewise, your job is to screen out sensational, not just emotional evidence, but sensational evidence.

Let's say the defendant today was David Duke, and the District Attorney's Office paraded a whole scrapbook

full of photographs in front of you. Let's say David Duke was charged with embezzling from his company, and he presented a whole scrapbook full of picture to you of David Duke in his Ku Klux Klan robes.

Would you all agree that that had nothing to do with whether he embezzled any money? Could you recognize that evidence and see it for what it is, an attempt to sensationalize things, make you not like the defendant? And could you throw that evidence out, because it doesn't have anything to do with anything?

[220] [682] And likewise in that instance, you have to guard against prejudice against who David Duke is. And could you just say, whether you like him or not, I'm not going to look at who he is, I've got to look at whether he did what they say. Everybody can do that?

We talked a little bit about law enforcement officer, and judging the credibility of witnesses. I'm going to ask you if there's anybody who feels like under no circumstances could you believe that a police officer might lie on the witness stand. Any circumstances in which you could believe that would happen?

Captain Bondi, police officers are human they can lie like anybody else. Does everybody feel that way?

MR. BONDI: Yes.

MS. daPONTE: Or does anybody feel like they're going to automatically believe a police officer more than they would believe another witness.

How about you Mr. Brooks?

MR. BROOKS: No. I can believe that a police officer would lie.

MS. daPONTE: Is there any chance that you could believe Mr. Snyder if he tells a different story than what a police officer tells, any [221] [683] chance you could believe him over a police officer?

MR. BROOKS: I would weigh what I heard.

MS. daPONTE: Everybody agree with that?

MR. BROOKS: Yes.

MS. daPONTE: You will hear about some instances of domestic violence in this case, and there are going to be some instances where Mr. Snyder is alleged to have abused his wife Mary Snyder. And that evidence, I'm going to tell you two things about it.

First, there are a few instances of it that the State is going to present to you, and second, there's a very specific reason for the presentation of that evidence; and that reason is to show motive, and to show intent.

And you're going to hear from the Judge that you can only consider it for those two reasons, motive and intent. And that you cannot consider it to determine actual guilt.

That's asking a lot. That's asking a lot, and I'm going to ask you if you think that might be asking too much.

Mr. Burns, it's a very hard distinction, and I don't even know if I've made it clear.

MR. BURNS: [222] [684] I'm not clear on it.

MS. daPONTE: It's what's called other crime's evidence. And generally that's not admissible, but when

the State seeks to use it in order to prove motive or intent for the crime charged, they can do that. But you can't determine that just because that evidence came before you, that Mr. Snyder actually committed the crime.

In other words, you can't use it to determine his ultimate guilt. You can only use it to determine motive and intent, and I know that's a very difficult standard.

Is there anybody that feels like you'd be so inflamed by testimony about domestic violence, that you couldn't use it only for that very limited – that very limited reason?

Has anybody – and certainly we could approach the Bench if it were more comfortable for any of you; has anybody had any experiences with friends or family members who have been the victim of domestic violence, that might make it just real difficult for you?

I'm going to start with you, Ms. Lebourgeois. Is this something that you would – anybody, at any time, if there's something you prefer to discuss at the Bench, we can do that.

MS. LEBOURGEOIS: [223] [685] I had an ex-boyfriend who pushed me around a lot.

MS. daPONTE: Given that – and I appreciate your honesty. Is that something that you think might weigh on your mind and make it difficult –

MS. LEBOURGEOIS: Yeah.

MS. daPONTE: – for you to –

MS. LEBOURGEOIS: You know, I don't think it's – I don't think it's right.

MS. daPONTE: Okay. And knowing what I told you about the evidence that is going to come in in this case, do you think that it's possible you might decide, if you hear about evidence of domestic violence, he did the murder, period? I really am going to be very prejudice against him if I hear about that domestic violence?

MS. LEBOURGEOIS: I don't know. It would depend on the – I don't know.

MS. daPONTE: Okay. Anybody – Mr. Brown?

MR. BROWN: My sister was in a really bad marriage, her husband beat her up.

MS. daPONTE: [224] [686] I'll ask you the same question.

MR. BROWN: All right. It would be tough, I don't know.

MS. daPONTE: Back row. Mr. Lewis?

MR. LEWIS: A sister that has been abused by her husband.

MS. daPONTE: Same question to you. Given your family circumstances, do you think that evidence might be so inflammatory that you couldn't just consider it for the limited purpose for which it can be considered, but that you might decide the ultimate issue of guilty based on that evidence that you hear?

MR. LEWIS: No. It would be all the evidence.

MS. daPONTE: Okay. Ms. Lovell?

MS. LOVELL: You know, I have a couple of close friends that were abused by their husbands and boyfriends, but it wouldn't effect nothing about the outcome.

MS. daPONTE: Mr. Burns?

MR. BURNS: I've had some cousins that were in a tough marriage, and I think I could probably separate it out, but it would be tough. I [225] [687] could probably separate –

MS. daPONTE: It would be tough for you to separate that out?

MR. BURNS: It would be tough, yeah. I think – again, you can't tell unless you hear it but should emotions get involved with that.

MS. daPONTE: I'm just going to ask you as honestly as you can be, if you heard about evidence of domestic violence, if you heard about evidence that Allen abused his wife Mary or some specific occasions, do you think that that might push you over the edge where you would absolutely – in other words, decide the ultimate issue of guilt on a close case, because you heard that evidence about domestic violence?

MR. BURNS: I sure wouldn't want to. On a thinking level, no I wouldn't want to do that, I wouldn't do that. But I would – the emotional weight of that, I don't know.

MS. daPONTE: Anybody else?

I probably should have started with this, but I wanted to jump right in with some issues that I thought were hot

buttons. Mr. Williams talked about the presumption of innocence, and that's – you need to – our system of justice in this country, [226] [688] because what it means is, that – remember when I introduced you to Allen, and I said this is the most important person in this courtroom; well this person is also, – he's got the highest status of anybody in this courtroom, and if you met me or Mr. Williams or the Judge at a cocktail party, and we told you what we did, Judge Hand is a Judge, and you might think that's very interesting, you know, tell me more about that. And Mr. Williams might say, I'm a prosecutor for Jefferson Parish, and you all might say, what a great job, tell me about that, that sounds very interesting. And I might say I'm a defense attorney, and you might say, well, okay, that's okay too.

But what about if you met Mr. Snyder and he told you I'm a criminal defendant in a first degree murder case? I think you'd probably all move away from him. You know, I don't think – I think there wouldn't be any doubt that at that cocktail party he would be the least popular person in the room, and he'd probably have a lower status there.

But in this courtroom, Mr. Snyder has the highest status. His status as a criminal defendant is higher than their status as assistant D.A.s, and that's because of the presumption of innocence.

In this country, your mind-set has to be – you have to be able to look at Mr. [227] [689] Snyder, and look at the D.A.s, and say to them, I don't believe Mr. Snyder committed first degree murder, I don't believe it, and you have to prove it to me.

Mr. Louis, you're nodding at me.

MR. LEWIS: I can't stand violence.

MS. daPONTE: Something you could do. I believe you. Is that something – Mr. Bourgeois, can you do that? Can you tell them right now, I don't believe your case?

MR. BOURGEOIS: I believe that he's innocent until proven guilty.

MS. daPONTE: Ms. Braud?

MS. BRAUD: He has to be proven guilty.

MS. daPONTE: And you can look at him right now and believe that he's innocent?

MS. BRAUD: Uh huh.

MS. daPONTE: Ms. Lovell?

MS. LOVELL: Clean slate.

MS. daPONTE: Okay. You've said that before.

All right, Mr. Burns, how about you?

MR. BURNS: [228] [690] Yes.

MS. daPONTE: Ms. Remond?

MS. REMOND: He's innocent right now.

MS. daPONTE: And you can look at him and believe that?

MS. REMOND: Yes.

MS. daPONTE: How about you Mr. Bondi?

MR. BONDI: He's innocent right now.

MS. LEBOURGEOIS: He's innocent.

MS. daPONTE: You say that so reluctantly.

MS. LEBOURGEOIS: I know, because now I'm thinking about the previous question.

MS. daPONTE: Okay. Do you have something you want to add on that?

MS. LEBOURGEOIS: Uh uh.

MS. daPONTE: Okay.

MS. LEBOURGEOIS: No.

MS. daPONTE: Okay. Is it going to be hard for you to [229] [691] give him the presumption of innocence, knowing what you know about the domestic violence issues that are going to come in?

MS. LEBOURGEOIS: Probably.

MS. daPONTE: Okay. And I understand that, and I appreciate you telling me that. Thank you.

Mr. Brooks, how about you, can you presume Mr. Snyder innocent?

MR. BROOKS: I have a question about the law that he said earlier, that the reason of insanity shifts to you all.

MS. daPONTE: I'm coming right up to that, if you'll give me just a minute.

MR. BROOKS: So actually, you make the case, or who?

MS. daPONTE: Okay. I'll get to that.

Can I get to that in just a minute?

MR. BROOKS: Okay.

MS. daPONTE: Okay. Is that going to effect whether you're able to give him the presumption of innocence?

MR. BROOKS: I'm just listening to the law.

MS. daPONTE: I understand that. Can you presume that [230] [692] Mr. Snyder is innocent right now?

MR. BROOKS: Yes.

MS. daPONTE: And you can presume that they – they're wrong about this charge?

MR. BROOKS: Yes.

MS. daPONTE: Let's talk about why – you see, the burden of proof goes hand and hand with the presumption of innocence, it's because of the presumption of innocence in this country that the burden, except for – in this case, except for in the defense, that the burden is on the State.

When somebody is presumed innocent, they are presumed innocent, so it's up to the State to show you why they are right, why they're not wrong about their charge. So they've got to do, at this point, all of the proving, they've got to prove all of the elements of first degree murder, they've got to prove it was Mr. Snyder, and they've got to prove that he had a specific intent to kill or to

commit great bodily harm on more than one person. They do all of that.

Does anybody have any problem with that?

Is that fair, Mr. Bennett, that they have to prove that?

MR. BENNETT: Yes, I think so.

[231] [693] MS. daPONTE: Is that fair, Mr. Lewis?

MR. LEWIS: Yes.

MS. daPONTE: Is that fair, Ms. Lovell?

MS. LOVELL: Yes.

MS. daPONTE: Mr. Brooks?

MR. BROOKS: I think so.

MS. daPONTE: Now, Mr. Snyder has two pleas here, not guilty, and not guilty by reason of insanity.

And what that means is, if I put his sanity at issue, I must show you, not beyond a reasonable doubt, but by a preponderance of the evidence, that he did in fact suffer from a mental disease or defect that he was not able to tell right from wrong.

What that means is, okay, this is a two-pronged plea, this is a two-pronged, not guilty is the first plea; and not guilty by reason of insanity is the second plea.

So you decide, you decide if I've proved that on August the 16th of 1995, Mr. Snyder was suffering from a mental disease or defect which rendered his ability to tell right from wrong, he couldn't do it, he couldn't tell right from wrong. You decide [232] [694] that. And if you decide yes

he knew right from wrong, then you decide if the State has proven that he's guilty.

So it's not not guilty by reason – you're nodding, you understand?

MR. LEWIS: You have to prove first that he was – due to insanity.

MS. daPONTE: Yes.

MR. LEWIS: And if you prove that, then we have to fall back on the prosecution, proving that he was guilty, is that correct?

MS. daPONTE: Yeah. Well, if I prove that he didn't know right from wrong, and you believe that, then the case is kind of over.

MR. LEWIS: Oh.

MS. daPONTE: If I don't, if I don't, then you still have to decide whether he was guilty of the crime or not. All right? So that all of the defenses that would be available to a defendant in a criminal case, are still available. It's not – he's not insane, so he must be guilty as charged. That's not the way that it works, it's not guilty when all of the defenses available on a not guilty verdict, and all of the responsive verdicts, you remember those four – those [233] [695] three responsive verdicts, not guilty, guilty of manslaughter, and guilty of second degree murder, all of those are available if you decide that I did not prove that he did not know the difference between right and wrong. Then you decide about the rest of the case.

That may be unclear right now. I think it's going to be real clear if you're chosen to sit on the trial, it sort of falls into place.

Mr. Burns, am I confusing you?

MR. BURNS: No.

MS. daPONTE: Okay. All right.

So if I put on evidence that Mr. Snyder had a mental disease or defect which rendered his ability to – which made him unable to tell right from wrong, and you decided that you didn't believe that evidence, and you think he did know right from wrong, could you still consider whether the State had met its burden of proving to you that he committed the crime of first degree murder, that's my question?

MR. BURNS: Yeah, no problem with that.

MS. daPONTE: Okay. Everybody understood the way I put it? Does anybody have a problem with that?

[234] [696] Did I answer your question, Mr. Brooks?

MR. BROOKS: Yes, ma'am.

MS. daPONTE: Let's talk a little bit about the State's burden of proof.

It is – Mr. Williams doesn't want to tell you what it is, – I mean, he doesn't want to tell you what it means. I'll tell you what it is, it's beyond a reasonable doubt, and it's the highest legal standard known to man, it's the highest legal standard that we have. You've got probable cause, and a preponderance of the evidence, which means just the tip of the scale, and then you've got something higher than that,

which is clear and convincing evidence, and then you have beyond a reasonable doubt, which is a real big hurdle.

And the State has to prove it as to every element that they're charging him. If they miss even one, if they don't prove specific intent to kill more than one person, it's not first degree murder. Okay? If they miss one of the elements, they don't prove that charge.

Does everybody understand that?

I would ask that in applying that standard, and I'd ask the same thing that I have asked every single jury I've ever asked, and that is that you apply the same standard that you would apply in making the [235] [697] very important decisions of your own life. And we've said it a hundred times, this is life or death.

There is no question that this next week, these next few days are the most important days of Allen Snyder's life.

And there is no question but that the twelve people that are selected to sit on this jury, will never have a responsibility for somebody else like they're going to have in this room.

So what I'd ask, is that in making the decision, you use the very same standard you would use in making the most important decisions of your own life, and only you know what they are.

For me, it would be whether to get married, whether to buy a house, whether to have a second opinion, or go get the surgery that the doctor is telling me to get. Important decisions like that, I'd ask you to take this case that seriously.

Can everybody promise that you'll do that?

All right, let's go back and talk about what we mean when we talk about not guilty, and not guilty by reason of insanity. I just want to make sure everybody is clear about the mental disease or defect part.

I think everybody understands the inability to distinguish right from wrong, but you'd have to find that Mr. Snyder [236] [698] suffers from a mental disease or defect.

Does anybody – has anybody ever dealt with anybody who suffered from a mental disease or defect?

Mr. Bennett?

MR. BENNETT: As an emergency nurse I have too.

MS. daPONTE: Yes you have, that's right.

And did those people act the same as you or me?

MR. BENNETT: No.

MS. daPONTE: No. And do you believe that some of the things those people did were because they didn't know that it was wrong?

MR. BENNETT: Yes, I believe that.

MS. daPONTE: Has anybody else every [sic] had any dealings with people with mental illness?

MS. LOVELL: I have a close friend of mine who has a severe personality disorder.

MS. daPONTE: A very close friend? Is that person on medication?

MS. LOVELL: Yes.

MS. daPONTE: Okay. And when your friend is on the [237] [699] medication – is it a man or a woman?

MS. LOVELL: A woman.

MS. daPONTE: Woman. When she's on the medication, do you see a big difference?

MS. LOVELL: Yes.

MS. daPONTE: And when she's not on the medication, –

MS. LOVELL: Oh, yeah.

MS. daPONTE: – you know it? Okay.

Do you know the name of that disorder that's she's got?

MS. LOVELL: Multiple personality.

MS. daPONTE: And when she's not on the medication, do you feel like sometimes she doesn't know that what's she's doing is wrong?

MS. LOVELL: Yes.

MS. daPONTE: Anybody else have any dealings with mental illness, Alzheimer's, anything like that? Okay.

You, Mr. Brooks?

MR. BROOKS: I'm a future teacher, and I run into students who have different problems, [238] [700] retardation, things like that.

MS. daPONTE: Things that are caused by a process in the brain?

MR. BROOKS: Mental retardation, yes.

MS. daPONTE: Okay. Ms. Lebourgeois?

MS. LEBOURGEOIS: My grandmothers both have Alzheimer's.

MS. daPONTE: Alzheimer's. So you understand that some times there's a process in the brain, we look normal on the outside, but because of a deteriorating process in the brain we do things that we wouldn't do?

MS. LEBOURGEOIS: Uh huh.

MS. daPONTE: Can anybody, other than Alzheimer's, multiple personality, name any mental diseases?

How about clinical depression?

MS. LEBOURGEOIS: Yes.

MR. BENNETT: Blood sugar problems.

MS. daPONTE: I'm sorry?

MR. BENNETT: Blood sugar problems –

MS. daPONTE: [239] [701] Okay.

MR. BENNETT: – can cause people to act abnormally.

MS. daPONTE: All right. Have you ever run into any cases of clinical depression, and by clinical depression I'm not just talking about just being sad, I'm talking about clinical depression that actually is caused by an imbalance of serotonin in the brain?

MR. BENNETT: Yes, yes ma'am.

MR. LEWIS: My mother.

MS. daPONTE: Your mother. Is it all right if we talk about that a little bit?

Does she take medication to control that depression?

MR. LEWIS: Yes, it's due to diabetes.

MS. daPONTE: Okay. It's depression due to the diabetes?

MR. LEWIS: Yes. She had gone into low blood sugar.

MS. daPONTE: Just like a bunch of you have.

MR. LEWIS: Right.

MS. daPONTE: And do you notice the difference when [240] [702] she's on the medication and when she's not?

MR. LEWIS: Yes.

MS. daPONTE: So would everybody agree that – or has everybody heard or read that clinical depression is a brain problem, it is caused by something in the brain, it's not just being sad? Does everybody understand that? All right.

And there are medications to control it. Everybody understand that?

Has anybody heard of cases of depression that are so severe that somebody does something that they wouldn't ordinarily do, because they didn't know that what they were doing was wrong?

And I'll give you the example that I think is kind of a hot example, is postpartum depression. You've heard about

mothers who, because there's something wrong with the brain, something happens with hormones in the brain, are so severely depressed that in extreme instances they were killing their newborns. Has everybody heard about that?

Has anybody not heard about it?

Is that something, Ms. Lovell, that you could recognize?

MS. LOVELL: Uh huh.

MS. daPONTE: [241] [703] Is there anybody that could not recognize that that might have happened because they didn't know the difference between right and wrong?

Ms. Braud?

MS. BRAUD: I could understand that.

MS. daPONTE: I'm sorry, I can't –

MS. BRAUD: I could understand that.

MS. daPONTE: All right. Everybody understands that Mr. Snyder's presumption of innocence means that he is not required to do anything today. If I didn't want to stand up here and talk to you for such a long time, I wouldn't have had to do this at all, and you couldn't have held that against Mr. Snyder.

Likewise, Mr. Snyder is not required to present a single witness, he's not required to testify and tell you his side of the story.

Is there anyone who feels like a criminal defendant should be required to testify? Anybody feels that way?

Ms. Lebourgeois, how about you?

MS. LEBOURGEOIS: Uh uh.

MS. daPONTE: How about you, Mr. Bennett?

MR. BENNETT: [242] [704] Not necessarily.

MS. daPONTE: Mr. Bourgeois?

MR. BOURGEOIS: No. If he feels he's really innocent, I would wonder why wouldn't he want to testify.

MS. daPONTE: Okay. That's a good question.

Do you all feel the same way, why wouldn't he?

Can anybody think of a reason why a defendant might not testify?

MR. BROOKS: He may say something to destroy his credibility, by accident.

MS. daPONTE: And would that necessarily mean he was lying?

MR. BROOKS: No.

MS. daPONTE: Or would that necessarily mean he was guilty?

MR. BROOKS: Not necessarily.

MS. daPONTE: You all have seen me struggling up here to convey various things to you that I need you to know, and you can see that this communication is a process that's some times difficult.

[243] [705] Imagine if you're on trial for your life, how difficult it might be to convey, all right?

And Mr. Bennett, you talked about what you would do if you had a lawyer represent you. What if your lawyer said, Mr. Bennett, don't take that witness stand, this man has been trained to tear you apart like a pit bull, don't take the witness stand.

MR. BENNETT: I would heed his advice.

MS. daPONTE: You would listen to your lawyer.

Does anybody else feel like if your lawyer said don't take the witness stand, you would understand and would sit there and keep quiet.

Mr. Bourgeois, how about – even if you wanted to say I'm innocent, and if I said Mr. Bourgeois, I know this man, he will tear you to shreds, you can be Mother Theresa and he will make you look like a thief.

Could you listen to me?

MR. BOURGEOIS: Yes.

MS. daPONTE: Could everybody listen to me and stay off the witness stand if I told you to? And not hold it against Allen if I advise him not to take the witness stand?

I'm almost done.

Let me talk about the responsive [244] [706] verdicts in this case. We talked about first degree murder which carries the sentence of life or death.

We talked about second degree murder which carries a life sentence.

And the third responsive verdict is manslaughter, and I want to talk to you about manslaughter.

The fourth responsive verdict is not guilty.

Mr. Williams talked to you about first degree – about second degree murder, what that means is, specific intent to kill.

Manslaughter, it's just like first degree murder or second degree murder. You can be – if Mr. Williams proves up every single element of first degree murder, second degree murder, the jury can mitigate that case to manslaughter if it finds these special elements.

Well first of all, let me just ask, I might be able to shorten this up. Does anybody know about manslaughter? It's been so long since I haven't thought like a lawyer, I don't remember if I knew about manslaughter before. Has anybody heard about manslaughter and what that means?

Captain Bondi?

MR. BONDI: It's when you kill somebody where the particulars of the case don't fit into the first degree or second degree murder.

[245] [707] MS. daPONTE: Heat of passion? Have everybody hear of heat of passion?

That's basically that hot blood, and, it's even in the Code of Criminal Procedure that way.

A manslaughter is a murder which would be – or it's a homicide which would be murder, because all the elements are present, except that it's committed in heat of blood, immediately caused by provocation sufficient to deprive an average person of his cool reflection. All right, heat of blood, what else?

Heat of passion, hot blood, crime of passion, those are the things that you think of when you think of manslaughter? Okay.

And what you need to decide is, – well, you know what heat of passion is, it's so mad I could kill, everybody kind of gets that. You wouldn't do it if you weren't so inflamed.

But what the law requires you to do, is to decide whether the heat of passion was caused by provocation, and whether that provocation was something that would make an average man go crazy. What are some of the terms that you hear when you hear about heat of passion; he went crazy, he was off his – you know, he went nuts, he went insane, he lost his mind. It's very emotional.

And you decide whether the provocation [246] [708] is sufficient that an average person, and you decide what average is, and we'll talk about that in a minute, would lose his cool reflection.

And what that does, is it mitigates the crime, it certainly doesn't excuse it. You can get up to forty years for manslaughter, so we're not talking about excusing the crime, we are talking about mitigating it, because the law recognizes human frailties, and the law, in every jurisdiction in the whole country, has the crime of manslaughter, because those statutes, those legislatures have recognized human frailties and hot blood.

Let me ask you, is there anybody that can think of an example of something which would be a murder, but which might be mitigated to manslaughter? Anybody want to volunteer anything?

Let me give you an example. You knew I'd have one. Let me give you an example.

Say we have a woman who's lover is leaving her, and he tells her it's been great, so long, I'm leaving; by the way, I have AIDS. And she's horrified, and she rushes to the doctor's office and she gets a blood test, and two weeks later she gets the results, and she has AIDS too. And for three days she's out of her mind, and she goes to a bar, and she – the bar where she knows her ex-lover hangs out, and she [247] [709] brought a gun, and she waits until he comes out of the bar, and she shoots him.

That might be a case where murder would be mitigated to a manslaughter because of hot blood caused by provocation sufficient to deprive an average person of their cool reflection.

You would decide that. You would decide – certainly the hot blood is there. You would decide whether the provocation was sufficient, you would decide; the Code says immediate provocation. Actually the Code also says it's not going to be a manslaughter if the jury finds, the jury, not the D.A., not the Judge, if the jury finds that the offender's blood had actually cooled, or that the average person's blood would have cooled.

So in this situation, you get to decide. Number one, is finding out that somebody gave you AIDS sufficient provocation to cause you to lose your cool reflection, and act in hot blood and kill somebody? Is that sufficient?

Number two, just because this happened two weeks and three days after the initial confrontation, is that too long to make this a manslaughter?

Some of you might think that it is too long, and some of you might think, I don't care if she waited a year, that's a manslaughter, that is not a murder.

[248] [710] That's what's the great thing about the jury system, you get to decide that. And you also get to decide what the average person is, whether the average person finding that out would have lost their cool reflection. All right? So those are some things for you to consider.

Does anybody have any other – can anybody give me any other example of a murder that might end up being a manslaughter?

A man finds his wife in bed with the milk man, he comes home early – there was a man in Baton Rouge who shot the man who had been accused of molesting his son.

Do you remember that case, Mr. Brown? That man actually lay in weight [sic], he was at the airport, found out when the guy's plane was coming in, pretended to be on the telephone, and then shot the guy.

Now, would you agree, – well, I'm not even going to ask you if the District Attorney's decision to let him plead guilty to manslaughter was the right decision.

But that's the kind of case that you –

MR. WILLIAMS: Judge, objection, that's not what happened. The Grand Jury didn't charge him, they let him go, as a matter of fact.

MS. daPONTE: Well then, I'm mistaken. I thought that he pled guilty to manslaughter. But at any [249] [711] rate, the decision was made that this man was not responsible.

Would you consider things like that in deciding whether a case is mitigated from murder to manslaughter,

or are those things that you all could consider? Or do you believe that manslaughter just has no place in the law? Is there anybody that believes that, manslaughter just doesn't belong in the law?

When you have listened to the evidence in this case, you'll be called upon, – as Mr. Williams told you, this is a unanimous decision, you have to all agree.

But we also, each one of us, Mr. Williams and Mr. Snyder and I and Mr. Vazquez, we are entitled to your individual verdict. In other words, if you are persuaded by what your fellow juror tells you, and reminds you about the case, certainly you could change your mind. But if you have an opinion, we are entitled to you to hold fast to that opinion, if you are not persuaded. If it's late, or it's Labor Day, that is not sufficient persuasion.

So I'd just ask you to promise to speak up in the jury room, and hold on to your individual decision.

Can everybody promise me that?

MR. BROWN: Yes.

MS. daPONTE: [250] [712] I don't think I have any more at this point.

Mr. Vazquez has some questions that he wants to talk to you about with regard to the penalty issue.

I thank you for your attention.

MR. VAZQUEZ: Good afternoon ladies and gentlemen.

I'll try to be as direct as Mr. Williams was, and as thorough as both of these attorneys have been, and because they've been so thorough, I really don't have all that many questions to ask of you.

For the folks out in the audience, I think the next few rounds will go a lot quicker and a lot smoother, so don't think that this is a precursor of what's coming. I think we'll be able to move it a lot quicker. These folks are sort of – you're all sort of like guinea pigs, we're going over things in minute detail. But for the next batch, I think we'll be a lot quicker.

And I'd like to commend you for your honest answers, and let you know that there are no right and no wrong answers here. All we're seeking, both the State and the defense, are people who can keep an open mind.

Mr. Brown, I'm going to pick on you first, because I believe in response to a question by Mr. Williams, you had indicated that if you found the defendant guilty of [251] [713] first degree murder, you would automatically impose the death penalty. I thought I saw you raise your hand.

MR. BROWN: Yeah.

MR. VAZQUEZ: Is that correct?

MR. BROWN: Yes.

MR. VAZQUEZ: Okay. So what you're saying, sir, is that if you found Allen Snyder guilty of first degree murder, you could not consider anything that I may present to you by way of mitigation?

MR. BROWN: No. I think if he's guilty of first degree murder, he deserves the death penalty.

MR. VAZQUEZ: Okay. And let me tell you, there's nothing wrong with that opinion, everybody is entitled to their own opinion. I don't think you're a Nazi or anything like that, because we all have our own opinion.

Does anybody else feel that way?

MR. BOURGEOIS: If he's totally proven guilty of first degree murder?

MR. VAZQUEZ: Yes, sir. Because what's going to happen –

[252] [714] MR. BOURGEOIS: Then I think he should be put to death.

MR. VAZQUEZ: Okay. Let me just explain the process again, because the way we're doing it here – you know, the law requires that we do it this way, the problem is to do it. We're sort of presenting the cart before the horse when we're talking about the death penalty.

If in fact, after how ever many number of days, you all as jurors decide that Allen Snyder is guilty of first degree murder, we come back for what is the penalty phase.

Actually, you have, – you've already decided that the least he's going to get is life imprisonment, without probation, parole, or suspension of sentence.

Then, what you have to decide is, well, is that good enough, or should he then be given the death penalty.

So Mr. Bourgeois, what I'm going to do, is we're going to jump ahead a few days, and we're going to assume that the State has proven their case beyond a reasonable doubt, and that you are one of the jurors who was selected, and

has decided that he is – that Allen is guilty of first degree murder.

Is there anything that I could present to you by way of mitigation evidence, anything regarding his upbringing, anything regarding any sort of state of mind, anything regarding the way he conducted his [253] [715] life up until a certain point, whereby you would consider anything other than the death penalty?

MR. BOURGEOIS: Probably not, not if the evidence proves to me that it's first degree murder. I believe in the death penalty, I don't believe in somebody just living the rest of their life in prison.

MR. VAZQUEZ: So you would vote to impose the death penalty?

MR. BOURGEOIS: Yes.

MR. VAZQUEZ: Okay. Did someone else raise their hand? Did someone else say that as well, that is if you found him guilty beyond a reasonable doubt, Mr. Vazquez, I don't care what you put – whatever you put on that stand, I don't care who testifies, there's nothing else I could consider, he would automatically get the death penalty as far as I'm concerned. Okay?

MR. BOURGEOIS: This you didn't make clear; is this before you all try to prove your case of insanity, or after, or what?

MR. VAZQUEZ: Well, the defense is not guilty, and not guilty by reason of insanity, so it would be after that.

[254] [716] I mean, you would already have – let's assume you would have already have rejected that argument, that he was insane.

However, let me tell everyone that the law, the Code of Criminal Procedure, the Louisiana Code of Criminal Procedure, and this is the law, allows the defendant to present mitigating circumstances.

Mitigating circumstances are not excuses to the crime, because remember, whether he did the crime or not has already been decided, we're now talking about mitigation. We are now talking about reasons that may justify sparing his life, and letting him spend the rest of his life in jail.

One of the mitigators that the law allows us to present, is the fact that the offense was committed while the offender was under the influence of extreme mental or emotional disturbance. Okay?

Is that something – let me pick on someone else. Mr. Burns, is that something that you could consider, that you could seriously consider in determining life versus death? Because that's all I'm talking to you all about at this point, life versus death. Forget about guilt, you've already decided that.

MR. BURNS: His mental state at the time?

MR. VAZQUEZ: Yes, sir.

[255] [717] MR. BURNS: Yes, I could consider that.

MR. VAZQUEZ: By way of mitigation?

MR. BURNS: Yes.

MR. VAZQUEZ: Mr. Lewis, I'm going to disagree a little bit with what Mr. Williams said regarding the concept of mercy or sympathy, because in the penalty, or the sentencing phase, you are allowed to consider the concept of mercy.

And mercy can be anything, anything that comes from your heart, from your mind, from your experiences, you are allowed to consider that. The code specifically says that any other relevant mitigating circumstance is something that shall be considered.

So is that something that you could seriously consider, the concept of mercy?

MR. BURNS: Yes.

MR. VAZQUEZ: Does everyone understand that – because the State is also allowed to present several aggravating circumstances. Does everyone understand that this is not a counting process? In other words, if the State gets up and presents four aggravating circumstances, and the defense does not [256] [718] present any, that does not automatically mean that Allen Snyder gets the death penalty. Okay? Because the death penalty is never automatic, it's something that you all are to consider, you're not obligated to impose it.

Does anyone have a question about that? Okay.

Ms. Clerk, you indicated that because of your religious beliefs you would not be able to impose the death penalty, is that correct?

MS. CLERK: Correct.

MR. VAZQUEZ: If, let's say, you were to be selected on this jury, and the Judge instructs you on what the law is, and the Judge says that you are to follow the law, do you think that you could put aside your religious beliefs and follow the Judge's instructions? Or do you believe that – or are your beliefs so strong that you could not follow the Judge's instructions?

MS. CLERK: I would not be able to.

MR. VAZQUEZ: Now let me just say that the Judge isn't going to put anybody in jail if they say that, okay, that they can't follow the Judge's instruction one way or the other; there's nothing wrong with that.

[257] [719] Ms. Braud, if I were to present to you evidence that – again, we're going forward in time, and you've found the defendant guilty of first degree murder. If I present evidence to you that he does not have a substantial criminal history, is that something that you could seriously consider in returning life versus death?

MS. BRAUD: After listening to the entire case, and he is found guilty of murder, I'm for the death penalty.

MR. VAZQUEZ: Is –

MS. BRAUD: Nothing else would persuade me.

MR. VAZQUEZ: Nothing that I could present to you?

MS. BRAUD: No. It's the only judgment.

MR. VAZQUEZ: Ms. Lovell, let me ask you?

MS. LOVELL: It's based on the facts.

MR. VAZQUEZ: Right.

MS. LOVELL: The death penalty is substantial in and of its right, and so is the lack thereof. So it's just a matter of what the facts are like.

MR. VAZQUEZ: [258] [720] Ms. Lebourgeois?

MS. LEBOURGEOIS: I feel that if he has taken someone else's life, I think he should get the same.

MR. VAZQUEZ: You think he should get the death penalty?

MS. LEBOURGEOIS: Uh huh.

MR. VAZQUEZ: There's nothing I could do by way of mitigators, whereby you could consider any of the mitigators?

MS. LEBOURGEOIS: I don't think so.

MR. VAZQUEZ: Your opinion would be so fixed that –

MS. LEBOURGEOIS: Probably so.

MR. VAZQUEZ: Judge, could I have just one moment to confer with co-counsel?

You see, you've got a lawyer that actually kept his promise.

That's it. Thank you very much.

MR. WILLIAMS: Your Honor, I'd like the Court's permission to traverse several of the jurors regarding –

THE COURT: Permission granted.

MR. WILLIAMS: [259] [721] Thank you.

Let's see, specifically Mr. Bourgeois and Ms. Braud regarding their feelings about the death penalty.

First, let me – before I ask you, let me ask you, based upon the voir dire of Ms. daPonte and Mr. Vazquez, do you think you know what happened in this case? You've got a feeling you know what happened in this case?

MS. BRAUD: I –

MR. BOURGEOIS: Just some of the things, but not the whole story, no.

MR. WILLIAMS: Ms. Braud, how about you ma'am, based upon what Ms. daPonte and Mr. Vazquez just told you all over the last hour or so, do you think you know what happened in this case?

MS. BRAUD: No, I haven't heard – I haven't heard the case.

MR. WILLIAMS: Okay. Well then, Mr. Bourgeois, if I suggested to you that you don't know anything about the case, because all they're doing is throwing out legal concepts.

Like I said, what the lawyers say doesn't mean anything, it's just asking you all, as prospective jurors, how you feel [260] [722] about a certain defense, because you've heard insanity, you've heard manslaughter, you've heard he won't testify, you've heard just about everything. And obviously that doesn't make any sense, all of those things. But it's just – and it's their right to do it, it's absolutely proper to ask each and every one of you how you feel about certain legal concepts.

I want to make it clear that nobody is making up their mind about what us lawyers are saying right now. That will be after you're seated as a juror. It's just because it's human nature to sit there and think, well, I wonder what happened in this case. Well, she's talking about insanity and manslaughter, and what if he doesn't testify, and will you hold it against him, and all this. It's got to start making the ticker go, but it doesn't mean anything, it's just individual legal concepts, how do you feel about it.

Just as when Mr. Vazquez ask [sic] you about the death penalty, you said that I think that I would automatically impose it.

Well, let me give you – once again, we don't know what happened, we don't know what evidence you're going to hear, but let me give you an example, and ask you if you could consider the imposition of life imprisonment if the evidence showed that the defendant was a – just a principal whose [261] [723] participation was relatively minor.

And let me give you an example, let's suppose that a group of people decide to rob a bank. You get a guy who charts out the bank, you've got one guy that is the wheel man, the driver, and another guy is the guy that goes in with the gun and does the robbery. And they all decide before they go in that if anybody does anything, or tries to stop us, we'll kill everybody; and they all three agree on that. And let us suppose that the bank robbery is accomplished, one fellow stays home, one fellow is driving, and one fellow is the gunman. And the gunman goes into the bank and he kills the teller just because he doesn't want any witnesses; he gets back into the car, they drive off, and they go back and split up the loot with the third guy who is back at home.

Now, could you consider life imprisonment for the two guys who didn't actually commit the murder, in that kind of instance? Consider, and that's obviously not what happened here, but there are a large number of mitigating circumstances which you can consider. And that's all we're asking, is for you to listen to all of the evidence regarding whether you get the death penalty or life imprisonment, and if you can tell us that you would not, before you heard the evidence, make up your mind, but you'd listen to all the evidence, and then [262] [724] depending on what the evidence is, you'd render your decision.

Could you do that, sir?

MR. BOURGEOIS: Yes.

MR. WILLIAMS: Okay.

Ms. Braud, how about you, ma'am?

MS. BRAUD: Well, what you stated, three people planned a robbery, –

MR. WILLIAMS: Uh huh.

MS. BRAUD: – and one person shot another person.

MR. WILLIAMS: Yes, ma'am.

MS. BRAUD: The people that didn't shoot are just as guilty as the one who shot.

MR. WILLIAMS: That's the law.

MS. BRAUD: That's my theory.

MR. WILLIAMS: Well, and that's exactly what the law is.

But let's say, for example, that that was the case here, which it's not, but since we're just talking legal principles today; if that were the case, and if there was three guys sitting there on trial for that [263] [725] murder, then certainly the lawyers for the two guys that didn't actually pull the trigger –

MS. BRAUD: It would be the same.

MR. WILLIAMS: – would argue – would argue, we think you should spare our clients because they didn't kill anybody.

And that is a legitimate mitigating circumstance according to the law.

Now, if you could consider that, great. If you said guilty, death, end of story.

MS. BRAUD: That would be the end of the story for me.

MR. WILLIAMS: Okay. Could you envision any circumstance, perhaps somebody who's – what if there was a young man of fifteen years of age who committed a murder and was convicted of first degree murder, could you consider someone's age as a possible reason to give them life in prison as opposed to the death penalty?

MS. BRAUD: I'd have to hear the thing myself, I'd have to hear the case myself.

MR. WILLIAMS Ma'am, that's exactly my point. And that is, – what I'm asking you to do now, if you can, is to listen to all of the [264] [726] evidence before you decide.

MS. BRAUD: That's right.

MR. WILLIAMS: Exactly. But if you tell us now that if he's guilty of murder, it's automatically the death penalty, I will not listen to any evidence that you want to present to me to try to convince me to give him life imprisonment, then that's one thing.

But if you say, all right, if he's guilty of murder, he's guilt [sic] of murder, I'll listen to what you have to say before I make up my mind, that's entirely another thing.

Do you understand what I'm saying?

MS. BRAUD: Uh huh.

MR. WILLIAMS: And if you've made up your mind already, that's okay with me, you know, if that's what you truly believe.

But if you can tell us that I'll listen to all of the evidence before I make up my mind –

MS. BRAUD: I'm not easily swayed is what I'm trying to tell you.

MR. WILLIAMS: Okay. But could you consider mitigating evidence, or would you –

MS. BRAUD: If I've heard all the evidence, –

[265] [727] MR. WILLIAMS: Uh huh.

MS. BRAUD: – and this jury finds him guilty, that he killed somebody, –

MR. WILLIAMS: Yes, ma'am.

MS. BRAUD: – when it's going to be decided if he goes for death or life imprisonment; it'll be that death as far as I'm concerned.

MR. WILLIAMS: Okay. And Mr. Bourgeois, you understand, you could listen to the mitigation before you decided, is that correct, sir?

MR. BOURGEOIS: What you're saying is, it's like a separate –

MR. WILLIAMS: Absolutely.

MR. BOURGEOIS: Is that totally after?

MR. WILLIAMS: Absolutely. And I want to make sure you understand.

MR. BOURGEOIS: But you've already proven your case that he was guilty of first degree murder.

So all they're asking for is some sympathy for the defendant.

MR. WILLIAMS: Well, no. What they're asking for; the [266] [728] law allows the defense, in the penalty phase, you've already found him guilty, okay? In the penalty phase the law allows the defense to put on evidence, there are about twelve mitigating circumstances; that the offender was young, that the offender suffered from a mental defect at the time of the offense, that the offender was a principal whose participation was relatively minor, that the offender was under the domination of another person, you know, kind of a Patty Hurst [sic] kind of thing, there are a lot of things that they could put on evidence to try to tell you, look, this guy ain't the worst guy that there is. He's not up there with the Charles Manson kind of guy, give him a break, give him life in prison. And you make the decision.

And I'm going to put on evidence, I'm going to show that he's the kind of guy that does deserve the death penalty.

But it's up to you to weigh what the evidence is.

Can you do that?

MR. BOURGEOIS: It would have to be very strong mitigating evidence.

MR. WILLIAMS: But you could consider it?

MR. BOURGEOIS: Yes.

MR. WILLIAMS: [267] [729] Okay. Now, let's see, Ms. Lebourgeois, you had a problem with the domestic violence aspect of this. You heard a lot – do you think you know what happened in this case?

MS. LEBOURGEOIS: No.

MR. WILLIAMS: You've got an idea of what you think happened?

MS. LEBOURGEOIS: Probably, maybe.

MR. WILLIAMS: Okay. Well, I have to say, you have to just throw that out.

You were just asked about legal concepts, –

MS. LEBOURGEOIS: Uh huh.

MR. WILLIAMS: – and how you felt about them. And I believe you felt – or your told Mr. Vazquez that you would automatically vote for the death penalty.

Now, you've just heard what I told Ms. Braud, who feels very strongly about it, and Mr. Bourgeois who feels as he feels; how do you feel about that?

MS. LEBOURGEOIS: If they are – if they can take someone else's life, they deserve to have theirs taken too.

MR. WILLIAMS: [268] [730] Well, they deserve it, but would you automatically do that without listening to any evidence in their favor?

MS. LEBOURGEOIS: If he's found guilty of first degree murder, –

MR. WILLIAMS: Uh huh.

MS. LEBOURGEOIS: – without whatever that phrase is, without a reasonable cause or whatever, –

MR. WILLIAMS: Beyond a reasonable doubt.

MS. LEBOURGEOIS: Yeah. Then, yes.

MR. WILLIAMS: Okay. I respect that.

Let's see, I think that's all.

Yes sir, Mr. Bennett.

MR. BENNETT: Just one question. I need to make it clear in my own mind. Can he be proven insane, and still be found guilty in this case?

MR. WILLIAMS: No, no. In some states they have guilty and insane, not in Louisiana, no.

MR. VAZQUEZ: Judge, could I approach for a minute?

THE COURT: Sure.

(THERE WAS AN OFF THE RECORD CONFERENCE AT THE [269] [731] BENCH)

THE COURT: Mr. Bourgeois, Mr. Bourgeois, would you come over to the Bench, please?

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

MR. VAZQUEZ: Mr. Bourgeois I just have a few more questions, and I thought we'd do it a lot quicker up here.

I'm a little bit confused by your answers, and maybe it's me confusing you, or the D.A. confusing you, or whatever.

Did you not say, sir, that if you found Mr. Snyder guilty, beyond a reasonable doubt, of first degree murder, that you could not consider anything –

MR. BOURGEOIS: I wasn't considering the mitigating evidence as like separate course of action after – after we find him guilty.

So I could listen to the mitigating evidence. But like I said, it would have to be very very strong evidence for me to be swayed not to give him the death penalty.

MR. VAZQUEZ: Well, do you understand, that just like in the guilt phase, the defendant does not have to present any mitigation evidence?

So let me ask you to assume that I don't present any mitigation evidence.

MR. BOURGEOIS: If there was no mitigating evidence, no [270] [732] mitigating evidence, then I would say yes I would give the death penalty if he was found guilty of first degree murder.

MR. WILLIAMS: That's an improper question.

MR. VAZQUEZ: No, it's not.

MR. WILLIAMS: That's absolutely improper, you can't say you're going to do something and get a commitment from somebody, and then say, well, what if I didn't do it.

That's ridiculous.

MR. VAZQUEZ: But the law – it's not ridiculous.

MR. WILLIAMS: It is ridiculous.

MR. VAZQUEZ: No. Your objection is ridiculous.

I'm not required to present any mitigation.

They have to prove beyond a reasonable, doubt aggravating factors.

MR. WILLIAMS: They're not required to find life –

MR. VAZQUEZ: Yes he is, it's either life or death, that's the only two penalties.

MR. WILLIAMS: But if you're asking for an ultimate decision based upon what you might do, he doesn't have to give you a guarantee –

[271] [733] MR. VAZQUEZ: I'm not asking for a guarantee, I'm asking him if he could consider anything

other than the death penalty. And he's indicated he can not.

MR. WILLIAMS: That's after you said you presented no evidence.

MR. VAZQUEZ: Okay.

MR. BOURGEOIS: First degree murder, I do consider death – I mean, I would consider the death penalty.

I mean, I feel like the death penalty is what he should get on a proven first degree murder, without any mitigating evidence.

THE COURT: You heard some of the examples Mr. Williams said, or stated of mitigation, possible mitigating factors; under those – after hearing some of those examples, are there any sets of circumstances that you think that you would consider, giving life instead of death, after conviction for first degree murder?

MR. BOURGEOIS: Well, like I said, I would hear the evidence. I mean, I don't know, I can't think of any off hand, but –

MR. VAZQUEZ: Well, let me toss one out to you.

[272] [734] MR. BOURGEOIS: Like temporary insanity, is that, you know, is that one you might be thinking of?

MR. VAZQUEZ: Let me toss one out to you.

One of them, under the law, is lack of significant criminal history. Is that something that you could seriously consider in determining life versus death?

MR. BOURGEOIS: In other words, what do you mean by significant criminal history?

MR. VAZQUEZ: I know, that's the law, it's vague.

MR. BOURGEOIS: It's very vague. I mean –

THE COURT: It would have to be dependent on how significant to you?

MR. BOURGEOIS: To me, yes. That's what I said, it would have to be –

THE COURT: But if it was –

MR. BOURGEOIS: – strong evidence, you know, then I would consider, you know, life instead of death.

THE COURT: Okay, thank you, sir.

(MR. BOURGEOIS LEFT THE BENCH)

MR. WILLIAMS: [273] [735] In challenges for cause, I have Captain Bondi. He said he would never –

THE COURT REPORTER: Jim, you have to talk –

MR. WILLIAMS: Okay.

Dominick Bondi for cause, for no death.

THE COURT: All right, we're going to excuse Mr. Bondi.

MR. WILLIAMS: Okay.

MR. VAZQUEZ: Do you have an objection on that?

MS. daPONTE: No objection.

MR. WILLIAMS: Ms. Clerk, at the top, the crossing guard, she said she could never vote for the death penalty.

THE COURT: All right, we're going to excuse Ms. Clerk.

MR. WILLIAMS: And that's all for me.

THE COURT: Any objection?

MS. daPONTE: No objection to Ms. Clerk.

Judge, do you want our challenges for cause? Can we have just a second?

(DISCUSSION OFF THE RECORD)

[274] [736] Judge, we issue a challenge for cause as to Ms. Lebourgeois.

MR. WILLIAMS: No objection.

MS. daPONTE: Thank you.

As to Harlan Brown, who indicated that, for a variety of –

MR. WILLIAMS: No objection.

MS. daPONTE: Thank you. Okay.

Peggy Boudreaux, couldn't even consider an insanity defense, couldn't even listen to it.

MR. WILLIAMS: No objection.

MS. daPONTE: Okay. And Judge, William Bourgeois, we're –

MR. WILLIAMS: Object.

MS. daPONTE: – going to request a challenge for cause.

MR. WILLIAMS: He said he could consider it, that's the – if they could consider it, they're okay. Whether he was leaning towards it or not doesn't matter. You asked if he could consider mitigation, and he said he could.

THE COURT: [275] [737] He said he would consider mitigation, it would have to be very strong.

MR. VAZQUEZ: I think that imposes an unfair burden on us.

MS. daPONTE: I think it does, I think that imposes a higher burden on us.

MR. VAZQUEZ: He said it would have to be very strong mitigation, and –

MR. WILLIAMS: That's not the issue.

There's no law on that. The issue is, could they consider it. Just like if somebody got up there and said, I'm leaning heavily toward life, but I might could do the death penalty. There's no law on the burden, it's just "Consider" is the issue.

THE COURT: Okay. I'm not going to excuse him for cause.

MR. VAZQUEZ: Please note our objection.

MS. daPONTE: And Ms. Braud.

MR. WILLIAMS: No objection.

THE COURT: Peremptory challenges.

MR. WILLIAMS: Mr. Bennett is acceptable to the State.

[276] [738] MS. daPONTE: Accepted by the defense.

THE COURT: Mr. Brooks.

MR. WILLIAMS: Mr. Brooks is acceptable to the State.

MS. daPONTE: Accepted.

MR. WILLIAMS: Mr. Bourgeois is accepted.

MS. daPONTE: Excused.

MR. WILLIAMS: Mr. Lewis is acceptable.

MS. daPONTE: Acceptable.

MR. WILLIAMS: Ms. Lovell is excused by the State.

Mr. Burns is accepted by the State.

MS. daPONTE: Excused.

MR. WILLIAMS: Ms. Remond is accepted by the State.

MS. daPONTE: Excused.

MR. WILLIAMS: We've got three, Bennett, Brooks, and Lewis.

(END OF CONFERENCE)

THE COURT: All right. The Court would like to thank and excuse, at this time, everyone [277] [739] except for Mr. Bennett, Mr. Brooks, and Mr. Lewis.

You are to get your cards from the deputy and go downstairs to the jury room.

Thank you.

Would Marilyn Miller and Jessika Prem please come forward.

Would counsel please approach?

MR. WILLIAMS: Sure.

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

THE LAW CLERK: Ms. Miller, East Jefferson said that if you're a full-time employee, you have up to eighty hours per year you're entitled for jury duty.

If you've got any other problems, –

MS. MILLER: I do have. It will cause a problem, we're having to transfer – have my daughter transferred back and forth, going to school. By me living on the west-bank and they live out in Metairie, that's the only thing that I have a problem with.

MS. daPONTE: Do you think you could work that out Ms. Miller? Let me get to one – Do you think you'd be able to work that out?

MS. MILLER: You see, the thing is, my parents work, and that will cause a problem with them having to – I mean, I know they can't take [278] [740] off to go back

and forth bringing her. Thai would be a problem, transportation.

MR. WILLIAMS: Ma'am, the bottom line on this is, if you were selected as a juror, and you were sequestered, kept away, would you be worrying about what's going on on the outside, as opposed to listening carefully to the evidence? Do you think that that's a possibility?

MS. MILLER: It would be a problem.

MR. WILLIAMS: Okay.

MS. daPONTE: If you had it all worked out, if you were able to work out the transportation problem, do you think you'd be able to pay attention to the case and not be worrying so much that you couldn't listen?

MS. MILLER: No, because even if I worked it out, I would still have a problem with it with my daughter.

MS. daPONTE: Okay.

THE COURT: We're going to go ahead and dismiss you for cause.

MS. daPONTE: Note our objection.

(MS. MILLER LEFT THE BENCH)

[279] [741] (MS. PREM APPROACHED THE BENCH)

THE COURT: Are you a U.S. citizen?

MS. PREM: Yes.

THE LAW CLERK: Your employer called us back and said that they didn't think you were a U.S. citizen.

MR. WILLIAMS: They must want you at work.

(END OF CONFERENCE)

THE COURT: The deputy will escort you all to the jury room. Okay?

All right, we're going to go ahead and take a ten minute break now and let everyone use the bathroom or the phones or whatever.

So be back here around 4:20. Okay? Thank you.

(THE COURT STOOD IN RECESS)

(RECESS IS OVER)

(THE FOLLOWING IS A CONFERENCE AT THE BENCH).

MS. WAITS: I'm Aubranell Waits.

THE COURT: I understand you have problems with picking up –

MS. WAITS: Picking up my kids, yes.

THE COURT: No one can help you?

[280] [742] MS. WAITS: Well, my mother, I just spoke with her after I spoke with you, she would be able to get them today, but the rest of the week would be a problem, because she works also.

MS. daPONTE: And there's nobody else that could take them?

MS. WAITS: No.

MR. WILLIAMS: Ma'am, if you got selected on this jury, this is the important question, –

MS. WAITS: Uh huh.

MR. WILLIAMS: – do you feel that you would be worrying more about your children than you would be paying attention to the evidence?

MS. WAITS: If I was selected?

MR. WILLIAMS: Yes, ma'am, and you were sequestered –

MS. WAITS: If I knew there wasn't a problem with someone getting my kids, –

MR. WILLIAMS: Okay.

MS. WAITS: – and them being okay.

MR. WILLIAMS: Is that something you could check on [281] [743] tonight and let us know tomorrow?

MS. WAITS: Well, she's going to get them today, and I can let you know tomorrow.

MR. WILLIAMS: Very good. Okay, thank you.

(MS. WAITS LEFT THE BENCH)

(END OF CONFERENCE)

THE COURT: All right, please select thirteen more names at random.

THE LAW CLERK: Number 201, Patricia Gardner; number 341, Peter Licalli; number 366, Mary Lee McClaran; number 114, Timothy Christiansen; number 57, Mary P. Borges; number 69, Jeanne Braun; number 407, Tri Minh Nguyen; number 364, Lumay Mayeux; number 85, Gerald Buquet; number 454 Terry Powell;

number 93, Mary Calligan; number 217 Jeanne Glanzer. Jeanne Glanzer.

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

MR. WILLIAMS: Attachment. It's up to you all, I'll waive.

MS. daPONTE: I'll waive too.

MR. WILLIAMS: Okay. Call the next one.

(END OF CONFERENCE)

THE LAW CLERK: Number 146, Suzanne DiMaggio, and number [282] [744] 427, Stanley Pape.

THE COURT: Okay. Ladies and gentlemen, these proceedings are being recorded, so please speak loudly and clearly.

We will begin by asking each of you to give us your full name, address, occupation, marital status, and the number and ages of your children, if any. If you are married, please tell us your spouse's occupation if your spouse is employed outside the home.

MS. GARDNER: Patricia Gardner, I'm a teacher's aid, and manager of rental property we own.

My husband is a veterinarian.

I have three children, twenty three, twenty one, and going on nineteen.

And I live at 1025 Transcontinental Drive.

MR. LICALLI: My name is Peter Licalli. I'm a welder by trade, and my wife is in the food service industry.

I have three children, twenty seven, twenty six, and sixteen.

MS. McCLARAN: I'm Mary McClaran, I'm at 1108 11th Street, Gretna.

I'm retired from the courthouse here.

And I have one daughter, forty years old.

My husband works in New Orleans East at [283] [745] a frozen food store.

MR. CHRISTIANSEN: Tim Christiansen, I live at 4813 David Drive in Kenner.

I'm a CPA, I'm married, my wife is a CPA also.

I've got three kids, eleven, eight, and four.

MS. BORGES: My name is Mary P. Borges. I live at 4713 Park Drive South.

I'm retired. My husband is Allen, he's retired.

We have two children, two daughters, one forty five, and one forty two.

MS. daPONTE: Ms. Borges, can we find out what you and your husband are retired from?

MS. BORGES: National Inquirer.

MS. daPONTE: Thank you.

MS. BRAUN: Jeanne Braun, I live on Celeste in River Ridge. I work at a collections agency.

I have two children, nine months and twenty one months, and I am single.

MR. NGUYEN: Tri Minh Nguyen. I live on 3320 Wall Boulevard. I'm married, my wife is a toxicologist, I'm a pharmacist, and no kids.

MR. MAYEUX: [284] [746] John Mayeux, Jefferson Highway, River Ridge.

And my wife – I'm retired, my wife, Bernice, is a student at U.N.O.

I have four children, four boys from the ages of forty five, and two years intervals down each.

MR. BUQUET: Gerald Buquet. I live at 132 Hardin Court in Gretna.

I'm a salesmen in the oil field. My wife Carol, she works for a law firm, she's a runner.

I have three kids, twenty one, twenty six, and thirty two.

MR. POWELL: My name is Terry Powell. I live at 135 Central Avenue.

I'm in restaurant management, and I'm single with no kids.

MS. CALLIGAN: My name is Mary Ann Calligan. I live at 5201 Wabash Street.

I'm a communications telemarketing representative.

I have two daughters, twenty two, and nineteen, and I'm single.

MS. DiMAGGIO: My name is Suzanne DiMaggio, I'm an administrative assistant to a Manufacturers representative for pumps.

I'm married, have two children, twenty [285] [747] eight, and twenty four.

My husband is a computer technician.

MR. PAPE: My name is Stanley Pape. I live at 616 North Niagara Circle in Terrytown.

I'm retired, single, divorced for thirty six years.

I have one daughter thirty six years, with three children at home; three grand-children.

THE COURT: Okay. Please answer the questions of the attorneys.

MR. WILLIAMS: Thank you, Your Honor, may it please the Court.

Good afternoon ladies and gentlemen. I've got some good news for all of you all, that this will be the last panel we talk to today, so when we finish here, we'll go home for the day, I believe. So, I don't think this will take too long.

I know it's hard, I swear I do, I've been doing this for a long time, but bear with us, I'll guarantee you that this round won't take nearly as long as the last round did.

And, I'll start by asking the thirteen of you all who were just called to the box, were you able to hear all of the comments that were made in the first round of the voir dire? Okay.

[286] [748] The first question I have, Ms. Gardner you were called first, so I'll start with you. Did you understand the law on first degree murder?

MS. GARDNER: Yes.

MR. WILLIAMS: Do you have any problems applying it?

MS. GARDNER: I could not vote for the death penalty.

MR. WILLIAMS: Okay. Well, I'll get to that in a second.

But I need to know first, are there any of you all who need further explanation of the law of first degree murder? Okay.

Did any of you all have any problem with the example that I gave regarding specific intent; that specific intent can be formed in an instant prior to a homicide, it doesn't have to be premeditation that's planned out over a long period of time. Does anybody have a problem with that? Okay.

Before I get into the questions about the death penalty, after having heard what I said, and what Ms. daPonte said, and what Mr. Vazquez said, how many of you all here, honestly, by a show of hands, think that you know what happened in this case, or have got a clue of what's happened?

I'm not going to ask any of you all, I'm [287] [749] just asking for a show of hands. Okay.

Now, what I want you to do, is throw all of that out, because you don't know what happened. You were asked

about legal concepts, about whether or not you could follow those legal concepts, and we cannot go into the facts of the case. And are you all okay with doing that? Do you understand that what we're doing now is just asking you if you could follow certain aspects of the law, and whether or not they apply. It will depend upon what the witnesses say when they testify. Okay? Are you all very clear. on that?

Let's see, Ms. DiMaggio?

MS. DiMAGGIO: Yes.

MR. WILLIAMS: Okay. And it's their obligation as the attorneys for this defendant, to ask you how you feel about different – from insanity to manslaughter, to not testifying, to domestic abuse, all these things are kind of thrown out, not in an attempt by them, don't get me wrong, to confuse you or anything like that, but to see how you feel about those concepts, so they can decide if they want to keep you on the jury.

And that's – it's not done in an attempt to confuse you, or suggest to you what the defense, or the facts of this case are going to be. I want to make sure [288] [750] everybody understands -that. Is there anybody that has a problem with that? Okay.

Let's see, all right, now regarding the death penalty, I'm going to ask you all essentially the same questions that I asked the first group of people.

Once again, remember a few ground rules. Would you all thirteen agree with me right now that as that man, that defendant, Allen Snyder sits here, he is presumed to be innocent, and if you had to decide the case right now, you'd all have to say not guilty. Anybody have a problem with that? Okay.

Now, we're moving forward, and we're moving forward into the penalty phase. And obviously, when you're in the penalty phase, you've already found him guilty as charged, you've felt that there's been sufficient evidence to prove his guilt beyond a reasonable doubt.

Now, another thing that's important, because we went back and forth with a couple of the people on the first group regarding their ability to consider mitigating circumstances, I'm going to back up one second and give you like a two minute, and that's all, trust me, this isn't going to take long, explanation of how the penalty phase works. Okay?

It's another trial, it's where you decide life imprisonment or the death penalty. The State goes first, the State, [289] [751] by law, has to prove aggravating circumstances.

One of the aggravating circumstances is one you've already found, that is he had a specific intent to kill or inflict great bodily harm upon more than one person. If you find any aggravating circumstance, you have the right to impose the death penalty.

Additionally, the State has the right to put on other evidence about him, and about the circumstances that surrounded the murder, that's what we do. Then we rest.

Then the defense gets up, Mr. Vazquez will get up and will put on evidence in an attempt to show you why you should not do the death penalty, that you should consider life imprisonment. And you've already heard a bunch of those.

Now, the important question, ladies and gentlemen, and the only question, is if you were selected as a juror, could you listen to both sides before you decide?

If you feel like that no matter what the evidence is, whatever they say about him in his defense you would still impose the death penalty, that's one thing. Okay, I see.

If, on the other hand, you feel that no matter what the evidence was, you would automatically impose life imprisonment, that's another one. And if that's how you feel, truly, because of a long-standing religious, moral, or personal belief you [290] [752] could never impose the death penalty, or because of a long-standing personal belief, that you would only impose the death penalty, without regard to what the evidence was, that's the issue.

But if you say, well I'm leaning toward life imprisonment, but I could hear evidence about aggravation; or if I'm leaning toward the death penalty, but I'd listen to all of the evidence before I decide, then that's a totally different thing.

So, Ms. Gardner, could you consider the imposition of the death penalty?

MS. GARDNER: No.

MR. WILLIAMS All right. Is that because of a long-standing religious, moral, or personal belief?

MS. GARDNER: Yes.

MR. WILLIAMS: All right. And would it be fair to say, Ms. Gardner, that no matter what the evidence was, how horrible it was against that defendant, you would automatically impose life imprisonment?

MS. GARDNER: Yes.

MR. WILLIAMS: Mr. Licalli, if you were selected as a juror in this case, could you consider the [291] [753] imposition of the death penalty?

MR. LICALLI: I'm not as cut and dry on the law as you people are, because it is your trade. I believe in a higher law. And I'm not religious or anything, but, you know, in some cases I think the death penalty is warranted; in others, I do not believe.

In this particular case, I haven't heard the evidence, so I really can't answer that question, honestly.

MR. WILLIAMS: All right. Sir, would it be fair to characterize your answer as being, you could do either one, it would depend upon what the evidence is that you hear?

MR. LICALLI: It would depend upon what the evidence had to say, and how it effected my beliefs about life.

MR. WILLIAMS: Okay. Ms. McClaran, if you are selected as a juror in this case, ma'am, could you consider imposing the death penalty?

MS. McCLARAN: No, sir.

MR. WILLIAMS: All right, ma'am. Is that based upon a long-standing religious, moral, or personal belief that you have?

MS. McCLARAN: Both, yes sir.

[292] [754] MR. WILLIAMS: All right. Can you envision any sort of evidence that would cause you to change your mind, and –

MS. McCLARAN: No, sir.

MR. WILLIAMS: Okay. Mr. Christiansen, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MR. CHRISTIANSEN: Yes.

MR. WILLIAMS: Okay.

Ms Borges, is it?

MS. BORGES: Yes.

MR. WILLIAMS: If you were selected as a juror, – you're anticipating my question.

MS. BORGES: I know what you're going to say, I'm going to stop you.

MR. WILLIAMS: Could you consider imposing the death penalty?

MS. BORGES: No.

MR. WILLIAMS: All right. Is that based upon a long-standing religious, moral, or personal [293] [755] belief that you have?

THE COURT REPORTER: You have to answer.

MS. BORGES: Oh, yes.

MR. WILLIAMS: She's got to take everything down.

MS. BORGES: Oh, excuse me.

MR. WILLIAMS: That's okay.

Can you envision any set of circumstances which would cause you to change your mind?

MS. BORGES: No.

MR. WILLIAMS: Okay. Ms. Braun, if you were selected as a juror in this case, could you consider imposing the death penalty?

MS. BRAUN: No, no.

MR. WILLIAMS: No. Is that based –

MS. BRAUN: Personal.

MR. WILLIAMS: Personal reason. A long-standing personal reason?

MS. BRAUN: I wouldn't say long, just –

MR. WILLIAMS: [294] [756] Well, the reason I ask that, is have you made up your mind before thirty minutes ago?

MS. BRAUN: Okay.

MR. WILLIAMS: So – Okay.

MS. BRAUN: Then my understanding is –

MR. WILLIAMS: And can you envision any set of circumstances, Mr. [sic] Braun, that could cause you to want to change your mind, or cause you to want to impose the death penalty?

MS. BRAUN: It would depend upon the circumstances.

MR. WILLIAMS: Okay. Now, let's back up.

You said at first to me you could never impose the death penalty?

MS. BRAUN: I couldn't, no.

MR. WILLIAMS: And now you're saying that if the circumstances –

MS. BRAUN: No. I'm sorry, no.

MR. WILLIAMS: Okay. All right. Now, listen to my question, I don't –

MS. BRAUN: Excuse me, I didn't hear you right. I'm sorry.

[295] [757] MR. WILLIAMS: Okay. So no set of circumstances would change –

MS. BRAUN: No.

MR. WILLIAMS: Okay. Okay, Mr. Nguyen, if you were selected as a juror in this case, sir, could you consider imposing the death penalty?

MR. NGUYEN: No, I can't.

MR. WILLIAMS: Can you envision any set of circumstances which would cause you to want to impose the death penalty?

MR. NGUYEN No.

MR. WILLIAMS: All right. And is this a long-standing religious, moral, or personal belief?

MR. NGUYEN: Yes.

MR. WILLIAMS: Okay. Mr. Mayeux, if you were selected as a juror in this case, sir, could you consider imposing the death penalty?

MR. MAYEUX: I could.

MR. WILLIAMS: Mr. Buquet, if you were selected as a jury in this case, sir, could you consider imposing the death penalty?

[296] [757] MR. BUQUET: Yes.

MR. WILLIAMS: Mr. Powell, if you were selected as a juror in this case, sir, could you consider imposing the death penalty?

MR. POWELL: I could consider it if the terms were right.

MR. WILLIAMS: Okay. Ms. Calligan, if you were selected as a juror in this case, could you consider imposing the death penalty?

MS. CALLIGAN: I'm not really sure.

MR. WILLIAMS: Okay. Finally we've found one that's not sure.

MS. CALLIGAN: I'm not sure.

MR. WILLIAMS: And I – okay. Let me ask you this. Is that something – is this something that you have thought about before today?

MS. CALLIGAN: Not as – well, not as like I've thought about it today, you know, –

MR. WILLIAMS: Okay. Well, obviously it's –

MS. CALLIGAN: – considering a person's life at stake.

MR. WILLIAMS: [297] [759] All right. Well, do you understand how the system works?

MS. CALLIGAN: Yes.

MR. WILLIAMS: All right. Do you think, as far as you understand the system, that it's fair?

MS. CALLIGAN: Yes.

MR. WILLIAMS: Okay. Do you believe in capital punishment?

MS. CALLIGAN: I guess I do.

MR. WILLIAMS: Okay. Now, do you feel that your feelings, and I don't want to put words in your mouth, but I'm trying to identify it since you're not sure; do you feel that your kind of mixed feeling about the imposition of the death penalty would substantially impair your ability to be a fair juror in a death penalty type case.

MS. CALLIGAN: I think I could be a fair juror, but I '. . . really do not know if I can impose the death penalty on someone.

MR. WILLIAMS: Okay. Well, do you understand now I'm not asking you to do that?

MS. CALLIGAN: Right.

[298] [760] MR. WILLIAMS: Okay. I'm just asking you if you made it to that point, you could listen to the evidence, and if you felt the evidence was such that it warranted it, you could impose it, and if you felt that, for whatever reasons, that the defendant did not deserve the

death penalty, you could also impose life in prison? And if you can do both, and consider the evidence for both equally, that's fine.

MS. CALLIGAN: I –

MR. WILLIAMS: Do you want me –

MS. CALLIGAN: I think I could impose life imprisonment, but it would be very very hard for me to impose the death penalty.

MR. WILLIAMS: All right. Can you think of a set of circumstances – could you think of something that that man there could have done in his past that would cause you to want to impose the death penalty? In other words –

MS. CALLIGAN: I don't know that man, but if you want –

MR. WILLIAMS: No, just in general.

MS. CALLIGAN: [299] [761] What would I – if someone killed my child, and they were on trial, –

MR. WILLIAMS: Sure.

MS. CALLIGAN: – I would feel –

MR. WILLIAMS: But that's not the case here.

MS. CALLIGAN: Right.

MR. WILLIAMS: And it wasn't a child that was killed in this case.

I'll come back to you.

MS. CALLIGAN: Okay, good.

MR. WILLIAMS: Okay. Ms. DiMaggio, could you consider the imposition of the death penalty?

MS. DiMAGGIO: Yes.

MR. WILLIAMS: Mr. Pape, could you consider the imposition of the death penalty?

MR. PAPE: Yes.

MR. WILLIAMS: And would it be fair to say, Mr. Pape, that you would not consider life imprisonment?

MR. PAPE: No. I don't believe in life imprison- [300] [762] ment .

MR. WILLIAMS: All right. So no matter what the evidence was at the penalty phase, –

MR. PAPE: No. I think life imprisonment is cruel and unusual punishment, it's a long-standing belief.

MR. WILLIAMS: Okay.

MR. PAPE: If I, myself, if I was convicted of murder, would want to be put to death rather than face jail.

MR. WILLIAMS: Can we approach the Bench?

(THERE WAS AN OFF THE RECORD CONFERENCE AT THE BENCH)

MR. WILLIAMS: Ms. Calligan, I'm going to come back to you now, and I know this is difficult for you, and I'm just trying to work with you the best that I can, but unfortunately the way the law is, you have to give an answer to me. And I know it's virtually impossible for you

to give an answer since you don't know what any of the evidence is.

I'm just asking you, could you envision a set of circumstances that could cause you to, you know, you yourself, personally imposing the death penalty?

MS. CALLIGAN: [301] [763] That's hard to say yes, and to envision something.

MR. WILLIAMS: Well, –

MS. CALLIGAN: It would be – all I can tell you is it would be extremely hard for me to impose the death penalty.

MR. WILLIAMS: I will accept that answer.

But you could consider it?

MS. CALLIGAN: Yes.

MR. WILLIAMS: Okay.

I'll tender on the predicate to Mr. Vazquez.

MR. VAZQUEZ: Good afternoon, I guess, it's almost evening.

We're going to do it in a little bit different order this time.

Ms. daPonte will come up and ask you questions regarding guilt or innocence, but what I'm going to do, is question you all on the death penalty, just as Mr. Williams was asking you all some questions.

Does anybody – does everybody understand this? Anybody confused? I mean, do we understand where we're going with this?

Ms. Gardner, Ms. Calligan gave an [302] [764] example that if it were her child, or something like that, that's a point where she might be able to consider the imposition of the death penalty.

And I know Mr. Williams asked her, but assuming, and it's not the case, but assuming this were a case where you have a child who is kidnapped, raped, tortured, and murdered, do you think that's a situation where you could consider the imposition of the death penalty?

MS. GARDNER: No, because I think life imprisonment is more cruel, and that's what they deserve.

MR. VAZQUEZ: So there's nothing that I could – the State could do by way of aggravating circumstances where you could consider it?

MS. GARDNER: The cruelest punishment is to make him wake up every day and hear what he did.

MR. VAZQUEZ: Mr. Mayeux, how do you feel about that, do you feel like the death penalty is crueler than life, so much so that you could never impose the death penalty, or –

MR. MAYEUX: I feel sympathy for the victims for one thing.

MR. VAZQUEZ: Excuse me?

MR. MAYEUX: [303] [765] Nobody mentions the victim.

MR. VAZQUEZ: Okay.

MR. MAYEUX: If he kills, he should be killed.

MR. VAZQUEZ: Okay. So if you sat on the jury, and I'll ask the same question I asked earlier, and you found that the defendant is guilty beyond a reasonable doubt of killing someone, and the State shows some other aggravating circumstances, could you consider life imprisonment?

MR. MAYEUX: Perhaps.

MR. VAZQUEZ: Okay. Under what sort of scenario, could you give me an example? I hate to put you on the spot, but it's important to all of us to –

MR. MAYEUX: Well, I just don't think that insanity killings, –

MR. VAZQUEZ: Okay.

MR. MAYEUX: – I don't think that – I don't believe in them.

MR. VAZQUEZ: Okay. Let's assume that you disregard the insanity defense, and I present some sort of evidence to you, again, this is in [304] [766] the sentencing phase, – penalty phase, that Mr. Snyder was under some sort of extreme emotional or mental disturbance of some sort; is that something that you could consider in determining, again, we're not determining guilt or innocence at this point, but determining life imprisonment versus the death penalty; could you consider that mitigating circumstance in deciding life versus death?

MR. MAYEUX: To give him life rather than death?

MR. VAZQUEZ: Could you consider that, that circumstance?

MS. MAYEUX: No I wouldn't, I wouldn't.

MR. VAZQUEZ: That's not something that you could consider?

MR. MAYEUX: No.

MR. VAZQUEZ: Again, you found him guilty of first degree murder. If I present evidence to you, and this may or may not be the case, that he did not have a serious criminal history, is that a circumstance that you could consider, seriously consider?

MR. MAYEUX: Very unlikely.

MR. VAZQUEZ: [305] [767] Excuse me?

MR. MAYEUX: Unlikely.

MR. VAZQUEZ: Mr. – is it Buquet?

MR. BUQUET: Buquet.

MR. VAZQUEZ: Buquet, I'm sorry.

Same sort of question to you. You found him guilty of first degree murder; at that point, could you keep an open mind and listen to any sort of evidence that I would present to you regarding mitigating circumstances?

MR. BUQUET: Yeah, I would listen to it.

MR. VAZQUEZ: Could you seriously consider it, or is that something that –

MR. BUQUET: Uh, it would depend on what you would present, but I would listen to it.

MR. VAZQUEZ: All right. So that you wouldn't be automatically predisposed to vote for the death penalty simply because you found him guilty of first degree murder, would be my question?

MR. BUQUET: I thought I would think something like that until I served on a jury before; but I [306] [768] would have to listen to everything before I would make up my mind.

MR. VAZQUEZ: Okay. And Ms. daPonte may ask you some questions about that, about what sort of a jury was it?

MR. BUQUET: It was just a petit jury, it was over here, it was for car theft.

MR. VAZQUEZ: Mr. Powell, you said that under certain circumstances you could impose the death penalty?

MR. POWELL: Yeah. It depends on how I feel, you know, the death penalty is reserved for like the most vicious people, not for everybody. And it depends on how the person lead his life beforehand, and you know, evidence. I could go either way, really.

MR. VAZQUEZ: So you feel there are some crimes of first degree murder, where perhaps the death penalty is not justified?

MR. POWELL: Yeah, it depends on how cruel it was, and you know, beforehand what happened, and the history of the person.

MR. VAZQUEZ: Ms. DiMaggio, give me your feelings on that; you said you could impose the death penalty?

[307] [769] MS. DiMAGGIO: Yes.

MR. VAZQUEZ: Could you also consider life imprisonment?

MS. DiMAGGIO: No.

MR. VAZQUEZ: No. Do you feel that once you find someone guilty of committing first degree murder, that their life should be taken as well?

MS. DiMAGGIO: Yes.

MR. VAZQUEZ: And is there anything that I could do, or present to you by way of mitigating circumstances?

MS. DiMAGGIO: No.

MR. VAZQUEZ: Mr. Licalli, –

MR. LICALLI: Licalli.

MR. VAZQUEZ: – you indicated that the death penalty is appropriate in certain circumstances.

MR. LICALLI: I did indicate that.

MR. VAZQUEZ: Same question that I asked, I believe, Mr. Powell?

[308] [770] MR. LICALLI: That would be the scenario, would be that he would be found guilty of first degree murder?

MR. VAZQUEZ: Yes, sir.

MR. LICALLI: And then it would be up to you or Mr. Williams to either prove or disprove whether or not he

gets the death penalty in my opinion; that's the question, am I correct?

MR. VAZQUEZ: The question –

MR. LICALLI: Or to choose between the death penalty or life imprisonment?

MR. VAZQUEZ: Well, you've already chosen – by your verdict of guilty, –

MR. LICALLI: Correct.

MR. VAZQUEZ: – you've already chosen at least life imprisonment. So then really the question is, is it going to be the death penalty?

MR. LICALLI: I kind of lean towards, a little bit towards what this gentleman said, I'm not so much – what's got me very confused about this whole case is the insanity thing. Because I don't believe – now, this is a personal opinion, and you asked us to be [309] [771] honest, I'm being honest.

MR. VAZQUEZ: Right.

MR. LICALLI: I don't believe at any time a person of reasonable intelligence, of reasonable mental health, does not know, at any particular time, that it's not wrong to take another human beings life. That's my personal opinion, and that would, I fear, influence my decision in that matter, whether I would impose the death penalty on him or not, to make that decision.

MR. VAZQUEZ: Okay. But do you understand that the insanity defense goes toward the guilt or innocence; so that – and I know this is probably tough for everybody, because we're asking you guys – we're asking

you a bunch of hypotheticals, we're asking you to assume things that may or may not happen in the next few days.

The insanity defense goes towards the guilt or innocence stage of the proceedings.

MR. LICALLI: The first part, not the second.

MR. VAZQUEZ: The first – the first phase.

If there is going to be a second phase, then the insanity defense does not necessarily – is not necessarily there, because you've already found him guilty if [310] [772] we're at the second phase.

MR. LICALLI: Correct.

MR. VAZQUEZ: However, if, and I'm not saying I'm going to do this, but the law allows me to do this, if I present some sort of evidence regarding the fact that during the time of this particular crime he was under extreme emotional disturbance of some sort; is that something that you could consider – forget about guilt or innocence, because we're beyond that at that point.

MR. LICALLI: Uh huh.

MR. VAZQUEZ: Okay. We're deciding now life versus death, that's the only thing that's hanging in the balance.

If I present such evidence to you by way of doctors, lay witnesses, fact witnesses, and that sort of thing –

MR. LICALLI: But Mr. Vazquez, I just explained to you how I feel about that.

MR. VAZQUEZ: Yes.

MR. LICALLI: I don't believe at any time that a human being does not take another human being's life, and does not know that it's not morally correct, that it's wrong.

[311] [773] That's my opinion, you know, I really believe that.

MR. VAZQUEZ: Is there –

MR. LICALLI: I don't – I mean, unless you're a complete basket case, you know. But you can't – I mean, a dog knows when he's biting another dog he's wrong, you know. Any kind of violence, and especially that, of taking another human being's life, I don't believe that a person can be that far off base not to realize that they're taking another human being's life.

MR. VAZQUEZ: Okay. And that's fine, and there's nothing wrong with that opinion.

But is it such that you would not be able to consider life imprisonment?

MR. LICALLI: I think so. I really believe that it would influence my judgment that much.

MR. VAZQUEZ: Okay. So much that your vote would then be the death penalty?

MR. LICALLI: But you see – you know, as I said earlier, I would have to listen to the evidence and make that final decision. I can't answer you cut and dry right now –

MR. VAZQUEZ: I understand.

[312] [774] MR. LICALLI: – whether I could say, kill that man.

MR. VAZQUEZ: I understand.

MR. LICALLI: I can't do it.

You asked for honesty, and I'm trying to be as honest as I can.

MR. VAZQUEZ: And that's – no, I appreciate that. And that's all, thank you, I'm sorry. I didn't mean to offend you or upset you or anything.

MR. LICALLI: Oh no, no, I'm not upset.

MR. VAZQUEZ: Okay,

MR. LICALLI: I might be little tired, but I'm not upset.

MR. VAZQUEZ: Ms. McClaran, –

MS. McCLARAN: Yes, sir.

MR. VAZQUEZ: – any circumstance, if it were, you know, a horrible – I mean, all murders are horrible, but if it were a situation where you're talking about a child, raped, murdered, tortured, that sort of thing, do you think that's a situation where you could impose – consider the imposition of the [313] [775] death penalty?

MS. McCLARAN: No. I don't believe in it.

MR. VAZQUEZ: I see.

MS. McCLARAN: I worked in these courtrooms, so I've seen a lot.

MR. VAZQUEZ: Mr. Christiansen – Christiansen?

MR. CHRISTIANSEN: Yes.

MR. VAZQUEZ: Let me pick on you for a little bit.

Is the death penalty something that you've considered in your life, or is this – I know when everyone got a subpoena to come to court, whether it was last night or yesterday, or last week, or whatever, you probably didn't expect to be sitting on this type of a case. And so, in a way were sort of ambushing all you folks by asking you all these tough personal questions.

Is the death penalty something that you've, you know, given consideration to?

MR. CHRISTIANSEN: Yes.

MR. VAZQUEZ: All right. And what is your opinion on it, do you –

MR. CHRISTIANSEN: My first inclination, if someone is [314] [776] convicted of murder, is they should get the death penalty.

MR. VAZQUEZ: Would you be able to consider anything other than the death penalty?

MR. CHRISTIANSEN: Yeah, –

MR. VAZQUEZ: Such as life imprisonment?

MR. CHRISTIANSEN: I would listen to arguments.

MR. VAZQUEZ: Would the concept of mercy have anything – would you be able to consider that, because that is a mitigating circumstance that the law allows us to argue or present?

MR. CHRISTIANSEN: I don't think that would be one that I'd give much consideration to.

MR. VAZQUEZ: Would you give any consideration to the fact, if I can prove it, and this may or may not be the case, that Mr. Snyder didn't have a significant criminal history? Is that a mitigating circumstance that you can consider?

MR. CHRISTIANSEN: Again, I probably wouldn't – wouldn't consider that very strongly.

MR. VAZQUEZ: What about the fact that he was a pretty solid citizen up until the morning of this [315] [777] particular incident? I mean, he worked hard, and he provided for his many dependents he may or may not have?

MR. WILLIAMS: Judge, I have to object to that question, the form of it.

If he says, "If" it were shown, is okay, but when "We" show, or, you know, I think it has to be said "If".

MR. VAZQUEZ: I thought I said that, but I'll –

MR. WILLIAMS: I didn't hear you say "If".

MR. VAZQUEZ: I thought I said "If", I'm sorry.

If I were to be able to show that, is that something that you could give serious consideration to? And again, we're not talking guilt or innocence.

MR. CHRISTIANSEN: Right.

MR. VAZQUEZ: We're talking life and –

MR. CHRISTIANSEN: Yeah, I understand that.

And in all these cases I'd certainly give that consideration. Again, those circumstances don't strike me as a very strong reason to sway from the death penalty.

MR. VAZQUEZ: Ms. Borges, any case that you could [316] [778] think of? You know, the classic one is if you were trying the case of Adolf Hitler –

MR. WILLIAMS: Objection. Adolf Hitler is not on trial today.

MR. VAZQUEZ: No, but neither are some of the hypothets [sic] that Mr. Williams came up with.

MR. WILLIAMS: I object, –

MR. VAZQUEZ: And I think –

MR. WILLIAMS: – that's improper, and Mr. Vazquez has to know that.

MR. VAZQUEZ: That's not improper, that's –

Can we approach, so we don't have to argue in front of the jury?

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

MR. WILLIAMS: Judge, Adolf Hitler is not on trial. He can say, if it were shown that in this man's past he killed six million Jews, or if it's shown that this man killed a child in his past, but Adolf Hitler, Ginghis [sic] Khan, that's improper.

THE COURT: Yeah, let's just –

MR. VAZQUEZ: I'll ask that question. Okay?

(END OF CONFERENCE)

[317] [779] MR. VAZQUEZ: If it were shown that Mr. Snyder killed six million in his past, is that a situation where you could consider the imposition of the death penalty?

MS. BORGES: I could not hold someone's life in my hands.

MR. VAZQUEZ: Fair enough. Thank you, Ms. Borges.

You know I'm coming to you next.

Same sorts of questions to you, under any circumstances could you consider the imposition of the death penalty?

MS. BRAUN: No.

MR. VAZQUEZ: Mr. Nguyen?

MR. NGUYEN: No.

MR. VAZQUEZ: Under none?

MR. NGUYEN: No.

MR. VAZQUEZ: Your Honor, can I have a moment, please?

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

MR. WILLIAMS: My challenges for cause, and the only reason I'm up here now, is because there's only a couple of people.

Challenges for cause are Ms. Gardner.

[318] [780] MR. VAZQUEZ: Judge, just for the record, we'd note an objection.

THE COURT: All right. I'm going to excuse Ms. Gardner.

MR. VAZQUEZ: Objection for the record, that's all.

MR. WILLIAMS: Ms. McClaran. She said she could never impose the death penalty.

THE COURT: All right. I'm going to excuse Ms. McClaran.

MR. WILLIAMS: Ms. Borges said she could never impose the death penalty.

THE COURT: I'm going to excuse Ms. Borges.

MR. VASQUEZ: Same objection.

MR. WILLIAMS: Ms. Braun, lied and said she could never impose the death penalty.

THE COURT: I'm going to excuse Ms. Braun.

MR. VAZQUEZ: Object for the record.

MR. WILLIAMS: Same with Mr. Nguyen, because he got the death penalty from his wife.

THE COURT: [319] [781] I'm going to excuse Mr. Nguyen.

MR. VAZQUEZ: Object for the record.

MR. WILLIAMS: And that's all I have.

MR. VAZQUEZ: Mr. Pape said –

MR. WILLIAMS: No objection.

THE COURT: All right, I'll excuse Mr. Pape.

How about Ms. DiMaggio?

MR. VAZQUEZ: Yeah, she said she couldn't consider the mitigating circumstances.

MR. WILLIAMS: I have no objection.

THE COURT: I'm going to excuse her.

All right, what I'll do is, I'll excuse these six people.

MR. VAZQUEZ: Seven.

THE COURT: Seven. And you wanted to get seven more up right away?

MR. WILLIAMS: Right, seven.

MS. daPONTE: Are they going to stay where they are, or are you, are you going to move them, just so I can do new seating chart.

[320] [782] THE COURT: I'm sorry?

MS. daPONTE: Are they going to stay where they are, or are you going to move them?

THE COURT: I haven't thought about it.

MS. daPONTE: Well, I have to know for my seating chart.

MR. WILLIAMS: You'd like –

MS. daPONTE: I'd like to keep them where they are.

MR. WILLIAMS: I would too.

THE COURT: Yeah, let's keep them where they are right now.

MR. VAZQUEZ: Why don't we – Judge, do you want to leave everybody where they are, and just don't talk to any of these folks?

MR. WILLIAMS: Why?

MR. VAZQUEZ: Because if not, you're going to have to re-voir dire on death penalty.

MR. WILLIAMS: Yeah, and I think now we've got a localized issue which won't take long, they already know what they're going to say on [321] [783] that.

THE COURT: Everybody in the audience has already heard it all, so it might be pretty quick.

MR. VAZQUEZ: Right.

MS. daPONTE: Right.

MR. WILLIAMS: And I'm not saying we have to get –

THE COURT: Let's try it.

MR. WILLIAMS: – twelve people, but we can –

THE COURT: Right.

(END OF CONFERENCE)

THE COURT: All right, the Court would like to thank and excuse, at this time, Ms. Gardner, Ms. McClaran, Ms. Borges, Ms. Braun, Mr. Nguyen, Ms. DiMaggio, and Mr. Pape.

All right, please call seven more names at random.

THE LAW CLERK: Number 344, Reubin A. Lottinger; number 370, Kelly McMurray; number 507, Gregory Scott; number 135, Karen Davis; number 269, Dorothy Isacks; number 275, Richard Jacob, and number 13, Julie Angelico.

THE COURT: I'm going to go ahead and ask the new [322] [784] jurors whose names were just called, to go ahead and give us their full name, address, occupation, marital status, and the number and ages of your children, if any. If you are married, please tell us your spouse's occupation if your spouse is employed outside the home.

MR. LOTTINGER: Reubin Lottinger, 426 Avenue L in Marrero.

Retired U.S. Navy.

Separated, have two children that are married, and they have children.

MS. McMURRAY: My name is Kelly McMurray. I'm a student for court reporting.

I'm married, and I have a child who is two and a half years old.

MR. SCOTT: I'm Greg Scott. I live in Harvey, Louisiana, 1712 Hampton Drive.

I'm an engineer with Entergy. My wife is a school teacher in Orleans Parish.

I have two children, ages fourteen and eleven.

MS. DAVIS: Karen Davis, at 1388 Maplewood Drive in Harvey.

I'm married, my husband is an x-ray technician at Avondale.

I have three children, twenty five, twenty two, and twenty one.

[323] [785] And I receive jewelry at a jewelry store.

MS. ISACKS: I'm Dot Isacks, I live at 327 West Livingston Place in Metairie.

I am a school administrator, and my husband is a builder.

I have two children, ages nineteen and twenty two.

MR. JACOB: Richard Jacob, 1368 Redwood Drive, Harvey, Louisiana.

I'm an operations coordinator for a Marine Transportation Company.

I'm married and have two children, one thirty three and one twenty eight.

MS. ANGELICO: Julie Angelico, 5321 Washingtonian, and I'm single, and I'm a teller at a bank.

THE COURT: Please answer the questions of the attorneys.

MR. WILLIAMS: Thank you, Your Honor.

Those of you all who were just called, were you able to hear everything that the attorneys have said so far?

Those of you who were just called, any questions about what the law is that's applicable in this case? Okay.

Mr. Lottinger, if you were selected as a juror in this case, sir, could you [324] [786] consider the imposition of the death penalty?

MR. LOTTINGER: Yes sir, definitely.

MR. WILLIAMS: All right. Ms. McMurray, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MS. McMURRAY: Yes, sir.

MR. WILLIAMS: I'm sorry?

MS. McMURRAY: Yes, sir.

MR. WILLIAMS: Okay. Let's see, Mr. Scott, could you consider the imposition of the death penalty if you were selected as a juror in this case?

MR. SCOTT: Yes.

MR. WILLIAMS: Ms. Davis, could you consider the imposition of the death penalty if you were selected as a juror in this case?

MS. DAVIS: I don't think so. I don't think I could live with myself to make that decision.

MR. WILLIAMS: Okay. Can you envision circumstances which might cause you to want to change your [325] [787] mind to impose the death penalty?

MS. DAVIS: No.

MR. WILLIAMS: All right. Your feelings against the imposition of the death penalty, I take it they're based on a personal belief?

MS. DAVIS: Right.

MR. WILLIAMS: There's nothing that you could be told, that Mr. Vazquez could tell you about this case that would cause you to change your mind?

MS. DAVIS: No, sir.

MR. WILLIAMS: Ms. Isacks?

MS. ISACKS: Isacks.

MR. WILLIAMS: Isacks. If you were selected as a juror in this case, could you consider the imposition of the death penalty?

MS. ISACKS: Yes, sir.

MR. WILLIAMS: Okay. Let's see, Mr. Jacob, if you were selected as a juror in this case, sir, could you consider the imposition of the death penalty?

MR. JACOB: [326] [788] Yes, sir.

MR. WILLIAMS: And Ms. Angelico, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MS. ANGELICO: Yes.

MR. WILLIAMS: Okay. Now, for those of you, and I want you again – once again, bear with us, you know, I don't think this is going to take long, I really don't; these people really need to concentrate on the questions that we're asking.

Ms. Angelico, you heard – you've just said you heard everything that was said in the first big round of voir dire.

Do you think you have an idea of what happened in this case, the facts of this case?

MS. ANGELICO: No.

MR. WILLIAMS: Okay. You understand that the things that Ms. daPonte asked of the first group, were how they felt about various legal principles that might or might not be applicable in this case. Okay?

All right. Is there anybody who feels they've got a real good idea of what happened in this case? Okay.

Mr. Lottinger, and I'm not necessarily [327] [789] going to ask you what that is, because it really doesn't matter. But do you understand that the questions that we lawyers ask you, we're not trying to get a commitment or trying to tell you and get your verdict in advance, we want to know if you can follow various legal principles. And that's what Ms. daPonte was seeking from the first group.

Now, do you understand that? Okay.

MR. LOTTINGER: Yes, sir.

MR. WILLIAMS: Now, let me ask you about the plea of not guilty by reason of insanity. Let's just – we're off the death penalty stuff now, and this is for all thirteen of you all who are seated in the box.

Now, Ms. Davis – I beg your pardon, I will skip over you since you've announced that you couldn't consider the imposition of the death penalty. I hope that doesn't offend you.

MS. DAVIS: No.

MR. WILLIAMS: Okay. Mr. Lottinger, regarding the plea of not guilty, and not guilty by reason of insanity, do you feel like based upon what we've said about it, that you've got a sort of an understanding about how it works?

MR. LOTTINGER: [328] [790] I don't believe in it myself.

MR. WILLIAMS: Okay. Well, a lot of people feel the same way you do.

Let me ask you a very relevant question. The law says that they have the right to urge that as a defense, just as they would alibi, self-defense, or any other defense that's available. And the law, nowhere does it say that you have to believe it.

MR. LOTTINGER: All right.

MR. WILLIAMS: The law gives them the opportunity to present that. Do you feel that you could listen to what they present, just, – I mean, you're not going to put your hands over your ears or walk out, are you? You listen to what they have to say, you listen to all the other evidence, and you assign whatever weight to it that you think it deserves.

Could you do that, sir?

MR. LOTTINGER: I told you, in my opinion on that, I don't believe in it, and I will stick with that, sir.

MR. WILLIAMS: Okay. Well, but could you listen to it?

MR. LOTTINGER: Not if I don't have to.

MR. WILLIAMS: [329] [791] Okay. You certainly will –

MR. LOTTINGER: All right.

MR. WILLIAMS: – if they desire to do that.

Mr. Licalli, how about you, sir? You have indicated that you really had a problem with that defense?

MR. LICALLI: I do.

MR. WILLIAMS: Okay. Well, let me ask you this. Same question to Mr. – that Mr. Lottinger was asked by me; nowhere is there any statute which says you have to believe it. The law gives the defense in any criminal case, whether it's a death penalty case, or a theft from Time Saver, the right to put on defenses like, I wasn't there, didn't do it, I acted in self-defense, I didn't know the difference from right and wrong at the time. Now, you don't have to believe it, you just have to tell us that you could listen to what they have to say about it. They have the right to call doctors if they so choose; don't know what they're gonna do. They can call experts, they can call friends, they can call whoever they want to say what they have to say about that defense. And I can cross examine them.

And after you hear that, you may laugh it off. But if you can tell us that you [330] [792] will listen to it, and then give it whatever weight you deem it deserves, then there's no problem.

Could you do that?

MR. LICALLI: In the sense of the words that you used, I probably could.

MR. WILLIAMS: Well, that's what the deal is, you know, we're not telling you – we're not telling you –

MR. LICALLI: I thought my job was to be – to offer an unbiased opinion of this man's guilt or innocence, –

MR. WILLIAMS: Yeah, that –

MR. LICALLI: – without any preconceived notions or opinions.

MR. WILLIAMS: That –

MR. LICALLI: Be it personal, or Court imposed. Is that correct?

MR. WILLIAMS: Well, that's sort of true, but everybody has got their own opinions, every single one of us has got biases and opinions –

MR. LICALLI: All I was trying to let Mr. –

MR. WILLIAMS: [331] [793] Vazquez.

MR. LICALLI: – Mr. Vazquez know, is that I do believe that if it come down to his guilt or innocence being decided on an insanity issue, that I would not be able to believe or give an unbiased opinion, because automatically I am biased about that. Because –

MR. WILLIAMS: Okay.

MR. LICALLI: – I feel the same way this gentleman does.

MR. WILLIAMS: Well, that's kind of a different thing. You recall that their plea is – it's two pleas, –

MR. LICALLI: I hear you.

MR. WILLIAMS: – not guilty on one hand, and not guilty by reason of – and it doesn't make – it can't make any sense to anybody, you know, that just sounds crazy, –

MS. daPONTE: Judge, I would object.

MR. WILLIAMS: – but they have the right to present that –

MS. daPONTE: I'm lodging an objection, Your Honor.

[332] [794] MR. WILLIAMS: And I'm voir diring, Your Honor.

MS. daPONTE: Judge, I object to the characterization.

MR. WILLIAMS: I'll withdraw that comment. All right?

THE COURT: All right, the jury is to –

MR. WILLIAMS: I perhaps shouldn't have said that.

THE COURT: – refrain from considering that comment.

MR. WILLIAMS: Okay. Just – I think you see what the deal is. Do you? You know, if you can listen to all of the evidence, you can be considered as a juror.

If you will not listen to evidence regarding the – and they don't even have to put it on, because they've got two pleas. They want to know what you think about it.

You know, it might very well be, and I have no idea what they're going to do, that they don't even use that plea, because they've also pled straight not guilty.

Do you understand that?

MR. LICALLI: I do understand that, and it's very conflicting in my mind how the court system is in

such a position that you're allowed to enter two pleas; either guilty or not [333] [795] guilty.

MR. WILLIAMS: No, –

MR. LICALLI: Or guilty by reason of insanity. I just don't understand how you can say, I'm not guilty, but I'm also not guilty because I'm insane.

MR. WILLIAMS: Some states have guilty, and insane.

MR. LICALLI: I just don't understand it. But, you know, I guess that's not my role –

MR. WILLIAMS: Okay.

MR. LICALLI: – as a juror, not to understand it.

MR. WILLIAMS: Well, but the bottom line question is, could you promise us if you were selected as a juror, you would sit there and you would listen to every bit of evidence?

MR. LICALLI: I would listen to everything.

MR. WILLIAMS: Very good. I'll move on.

Let's see, Ms. McMurray, –

MS. McMURRAY: Uh huh.

MR. WILLIAMS: – could you consider the evidence of insanity?

[334] [796] MS. McMURRAY: No.

MR. WILLIAMS: All right. Could you listen to it?

MS. daPONTE: Judge, I'm sorry, I don't – I've got to object, because I think the question properly is, could you consider it, not just because you listen to it. I think Mr. Lottinger phrased it very well, you'll have to listen to whatever comes out.

But the question should be, can you consider it.

MR. WILLIAMS: She's going to have her time to get up and talk to these people, and I'm talking to them now.

Judge, I'm – you know, we're not playing games here. If you don't believe in insanity, and you get up here, say I will not listen to it, and I'll move on.

If you can listen to all of the evidence in this case, then that's one thing.

Okay, can you do that, ma'am?

MS. McMURRAY: Probably not.

MR. WILLIAMS: Okay. Thank you.

Is there anybody else who feels that they could never ever give any weight whatsoever to the insanity defense?

Okay, Mr. Mayeux. No matter – you [335] [797] wouldn't even listen to it?

MR. MAYEUX: I think it's absurd.

MR. WILLIAMS: I agree. But could you –

MS. daPONTE: Judge, Judge, I'm sorry. I'm going to lodge another objection to that comment.

THE COURT: Yeah, please don't editorialize.

MR. WILLIAMS: Okay. Anybody else?

Yes, ma'am?

MS. ISACKS: I need to let you know I have a real problem with it too.

MR. WILLIAMS: Okay. Well, –

MS. ISACKS: Okay, just so I'm on record –

MR. WILLIAMS: Could you listen?

MS. ISACKS: I could listen, but I wouldn't listen real fairly. Okay?

MR. WILLIAMS: Okay. Is there anybody else that feels that way?

MS. CALLIGAN: I just wanted to say though, the longer I'm sitting, and you ask me about the death penalty, and I'm sorry I'm going off the [336] [798] subject, –

MR. WILLIAMS: That's okay.

MS. CALLIGAN: – but I don't – I don't think I could give a verdict to take somebody's life, the longer I'm sitting here thinking about that.

MR. WILLIAMS: That's perfectly legitimate, sometimes when you hear other people talk about it, it makes it easier for you to identify your feelings, and I appreciate that.

And I'll have to ask you the questions, which are, if this is a long-standing belief? I mean, your feelings, –

MS. CALLIGAN: I guess I'm just sitting here and thinking of my own religious beliefs, and what I feel. I

could very easily give somebody life imprisonment, but to say that I was a part of a group that took, you know, that took someone's life, I don't think I could do that.

MR. WILLIAMS: Okay. Can you envision, as Mr. Vazquez asked the other jurors, any set of circumstances that could cause you to want to take somebody else's life?

MS. CALLIGAN: For me to take somebody's –

MR. WILLIAMS: Yes, ma'am.

[337] [799] MS. CALLIGAN: No.

MR. WILLIAMS: All right. Let's see, is there anybody else who has a – who feels – and the bottom line question is, if the insanity defense is put forth, that you would not even consider it or listen to it?

MR. JACOB: Yeah, I wouldn't listen to it.

MR. WILLIAMS: You wouldn't do that?

MS. JACOB: No.

MR. LOTTINGER: I wouldn't consider it either.

MR. WILLIAMS: All right. Mr. Lottinger, let me ask you this, and I'm sorry because I'm dragging this out, but I have a responsibility as well.

Can you imagine – have you ever hear [sic], personally, of someone who was insane, –

MR. LOTTINGER: Yes.

MR. WILLIAMS: – and didn't know the difference between right and wrong?

MR. LOTTINGER: I don't believe that.

MR. WILLIAMS: Okay. But have you heard –

[338] [800] MR. LOTTINGER: I mean, unless it was a guy that was strapped and going blab, blah, blah, blab, blah, –

MR. WILLIAMS: Well, like I said –

MR. LOTTINGER: – then I might believe that, yes.

MR. WILLIAMS: Like I said, remember the example that I gave to the first group of people, that if this crime was committed in front of an armed uniformed policeman, then maybe you'd think the guy had to be crazy, right?

MR. LOTTINGER: Not necessarily.

MR. WILLIAMS: Not necessarily. Okay.

MR. LOTTINGER: I've heard of people that a guy took a gun away from a policeman and shot him, so.

MR. WILLIAMS: Okay. All right.

Ma'am, how do you feel about that, do you feel – have you heard of circumstances where – and believed, that there were circumstances when people were criminally insane and not responsible for their actions?

MS. ISACKS: I think that the situation can exist.

MR. WILLIAMS: [339] [801] Okay. Well, if you think that it can exist, could you imagine that it can exist in this particular case, not having heard any evidence?

MS. ISACKS: I have heard something about domestic abuse, and that's all – you know, so I kind of have my mind made up. Okay?

MR. WILLIAMS: Okay. All right. Well see, that's the problem, you can't make up your mind when you hear domestic abuse, because you don't know what –

MS. ISACKS: I've heard it was going to be presented, didn't I, or something?

MR. WILLIAMS: Okay.

MS. ISACKS: That's what you all presented to us.

MR. WILLIAMS: Okay.

MS. ISACKS: And personally I have – I'm happy to come in on another point on that. Okay?

MR. WILLIAMS: I appreciate it.

MS. ISACKS: Certainly.

MR. WILLIAMS: Okay. Is there anybody else who has a problem with insanity?

[340] [802] I know I'm making you – you know, you all are getting mad at me, but I've got a gentlemen who's buried six feet in the ground that I feel very responsible for. Just as Ms. daPonte said, that the most important person in this courtroom is Allen Snyder; Howard Wilson is very important to me and to his family, and if I get upset, I'm sorry, but I'm very concerned for the victims as well.

So with that, let's get back to voir diring.

All right, are there any of you all who have served on juries before? That's an easy question, let's do that.

All right, let's see, Mr. Buquet?

MR. BUQUET: Yeah.

MR. WILLIAMS: You said it was –

MR. BUQUET: It was a petit jury here for armed robbery and car theft.

And I served on the Grand Jury in Houma about thirty years ago.

MR. WILLIAMS: All right. And were you the foreperson on that armed robbery jury?

MR. BUQUET: Yes.

MR. WILLIAMS: And what was the verdict of the jury?

[341] [803] MR. BUQUET: Guilty.

MR. WILLIAMS: Did the defendant testify in that case?

MR. BUQUET: Yes, sir.

MR. WILLIAMS: Okay. So, you've also been on a jury?

Okay. Let's see, have any of you all – I'll start with the first row – who have ever been the victims of a violent crime, or have any close friends or relatives who have been the victims of a violent crime?

MS. McMURRAY: Well, –

MR. WILLIAMS: I'll pass on you since – yes sir, Mr. Christiansen?

MR. CHRISTIANSEN: My wife was held up at gunpoint.

MR. WILLIAMS: How long ago was that, sir?

MR. CHRISTIANSEN: Probably six or seven years ago.

MR. WILLIAMS: Okay. Would that cause you to be unable to give Allen Snyder a fair trial in this case?

MR. CHRISTIANSEN: I don't think so.

MR. WILLIAMS: Okay. Mr. Scott, I neglected to ask [342] [804] you, – have you been the victim of a crime?

MR. SCOTT: My wife's car was stolen.

MR. WILLIAMS: Okay.

MR. SCOTT: And that was also at gunpoint.

MR. WILLIAMS: Okay. Okay, how do you feel about the insanity plea?

MR. SCOTT: Well, it's something that I would consider.

MR. WILLIAMS: Okay. In the back row, anybody personally been the victims of a violent crime, or have any close friends?

Okay, Mr. Buguet?

MR. BUQUET: I had an outboard motor stolen out my garage.

MR. POWELL: Is theft violent? I had a theft, but it wasn't violent.

MR. WILLIAMS: No, it's just I'm more interested in violent crimes against a person.

All right. Are there any of you all, who at any time, have ever called on any member of law enforcement for assistance for any reason, whatever it might be?

Okay, you passed.

[343] [805] Those of you all who raised your hands, were you all essentially satisfied by the way in which the police responded to your call for assistance?

I have no other questions.

MS. daPONTE: Before I start, is there anybody that wants to shorten this up by telling me right now of something you think I need to know? Okay.

Then I'll go to Mr. Christiansen. Could you consider the insanity defense?

MR. CHRISTIANSEN: Well, I feel a lot like some of these other people, I don't give it very much weight, but I would certainly listen to the arguments.

MS. daPONTE: And Mr. Powell?

MR. POWELL: I have an open mind about anything, but I mean, I don't know if I could see somebody innocent or guilty over it. I could put it aside

MS. daPONTE: Could you consider the testimony about someone could be suffering from a mental disease or defect that it was so grave they couldn't tell right from wrong?

MR. POWELL: Yeah, if there was a lot of proof on it.

MS. daPONTE: [344] [806] How about you –

MR. POWELL: A lot of proof.

MS. daPONTE: I'm sorry?

MR. POWELL: A lot of proof for it.

MS. daPONTE: Ms. Angelico, how about you?

MS. ANGELICO: I'd have to view the facts, I'm not going to rule it out.

MS. daPONTE: Okay. As long as you're not ruling it out.

Anybody have any policemen, or other law enforcement officers in their immediate circle of family or friends?

Skip you, I think.

Mr. Christiansen, you have police officer friends, or family?

MR. CHRISTIANSEN: I've got, yeah, several friends on the N.O.P.D., one with the State Police.

MS. daPONTE: How do you feel about the proposition that a police officer might not always tell the truth?

MR. CHRISTIANSEN: I believe that they may not always tell the truth.

MS. daPONTE: [345] [807] Any chance that you might believe a lay witness rather than a police officer, if their testimony was different?

MR. CHRISTIANSEN: Yeah, there would be a chance.

MS. daPONTE: Anybody else have any friends or family that are police officers?

MS. McMURRAY: My girlfriend's father is a Captain on the New Orleans Police Department.

MS. daPONTE: And same question to you, do you feel it's possible for a police officer to take the witness stand and tell a lie?

MS. McMURRAY: No.

MS. daPONTE: You don't think that's possible?

MS. McMURRAY: No.

MS. daPONTE: Okay. Just one moment, Judge.

Has anybody been in the military, or have any close family members in the military? Okay.

What branch, sir?

MR. LOTTINGER: U. S. Navy.

MS. daPONTE: Okay. And that was you yourself?

MR. LOTTINGER: [346] [808] Yes.

MS. daPONTE: That's right, I know that, you're a retired military officer, that was your career, correct?

MR. LOTTINGER: Yes.

MS. daPONTE: And Mr. Licalli?

MR. LICALLI: Army, Fifth Special Forces Group.

MS. daPONTE: How long?

MR. LICALLI: I did two tours in Vietnam, and about approximately eight years in the National Guard also.

MS. daPONTE: Anybody else in the front row?

Mr. Christiansen?

MR. CHRISTIANSEN: My father was in the Navy.

MS. daPONTE: Was he career Navy?

MR. CHRISTIANSEN: No.

MS. daPONTE: Did you raise your hand Mr. Scott?

MR. SCOTT: Yes. My brother was in the Marines, only briefly, a medical disability.

MS. daPONTE: [347] [809] Back row?

Ms. Angelico?

MS. ANGELICO: My uncle was a commander in the Coast Guard. And my ex-fiance was in the Navy.

MS. daPONTE: Mr. Jacob?

MR. JACOB: I was in the Army National Guard for seven years, from '55 until '62.

MS. daPONTE: Anybody else in the military?

Mr. Powell?

MR. POWELL: My father was in the Navy, and close friends was in the Navy.

MR. BUQUET: I was in the Marine Reserves for two years, and the Navy for four years.

MR. LOTTINGER: May I ask a question Ms. daPonte?

MS. daPONTE: Yes.

MR. LOTTINGER: What relevance does service have to do with this case?

MS. daPONTE: If you're a juror, I'm sure you'd – if you had to pick a jury, I'm sure you would find out.

But actually, in this case it may have some relevance. I asked that question for [348] [810] the same reason I ask questions about a lot of things, the police officer friends and families, it's things that I need to know about you that may help me to decide whether you'd be a good juror for this case.

Mr. Mayeux, you served in the military?

MR. MAYEUX: Six years, Navy; World War II.

MS. daPONTE: Ms. Isacks, we talk just briefly about your domestic abuse views. Do you feel like once – once you see that evidence, or once you hear that evidence, that's all you need to see, you're going to find him guilty, just because of the domestic abuse?

MS. ISACKS: Pretty much.

MS. daPONTE: Okay. Anybody else feel that way? Okay. Anybody else feel that way?

Could everybody consider that evidence only for what it's presented, to show motive and intent? And the Judge is going to give you that instruction, and it's a very hard distinction, but that's all you can consider it for.

How do you feel about that Mr. Scott, could you do that?

MR. SCOTT: Yeah.

MS. daPONTE: Okay.

[349] [811] MR. SCOTT: Just as motive, not really as an indication that somebody committed a crime.

MS. daPONTE: You can't find him guilty because you hear evidence of domestic abuse.

MR. SCOTT: Right, right.

MS. daPONTE: You can consider it to show motive and intent.

MR. SCOTT: Right.

MS. daPONTE: How do you feel about that Mr. – is it Buquet?

MR. BUQUET: Buquet.

MS. daPONTE: Yes. How do you feel about that?

MR. BUQUET: Uh, I wouldn't put him to death just because he beat up his wife.

MS. daPONTE: Okay. And I guess I needed to know that, that's – I appreciate you telling me that.

What I'm asking you about right now – it gets confusing, because we're talking about the penalty phase, and

then we're talking about the guilt phase, and there really are two trials here.

[350] [812] And what I'm concerned about, is evidence of guilt, and whether you would automatically just be so outraged by the allegations of domestic violence, that you wouldn't consider whether he's actually guilty of the murder that he's charged with?

MR. BUQUET: No.

MS. daPONTE: Okay. Thank you.

Does everybody else feel the same way Mr. Buquet does? All right.

Presumption of innocence, is there anybody that would have any trouble presuming right now that the State is wrong about Mr. Snyder? Right now you could look over and presume that he is not guilty. Is there anyone who cannot do that?

MR. LOTTINGER: I don't think I can.

MS. daPONTE: Okay. And I appreciate you being honest.

Ms. Isacks, how about you?

MS. ISACKS: Yes.

MS. daPONTE: Same thing. Okay.

Anybody else feel the same way?

Mr. Mayeux, can you presume Mr. Snyder innocent right now?

MR. MAYEUX: [351] [813] Not by looking at him, no.

MS. daPONTE: Okay. Right now you feel like he's guilty just by looking at him?

MR. MAYEUX: No, no.

MS. daPONTE: I'm sorry.

MR. MAYEUX: I'm sorry. I meant –

MS. daPONTE: I'm sorry, you meant the other thing, –

MR. MAYEUX: By telling, – by looking at a person, you can't tell whether or not they're innocent, you know.

MS. daPONTE: But right now, can you presume that he is, since the law requires you to?

MR. MAYEUX: He was arrested, was he not?

MS. daPONTE: Yes.

MR. MAYEUX: Okay.

MS. daPONTE: He was arrested, and indicted.

Do you think that because he was arrested and indicted he is probably guilty?

MR. MAYEUX: You got me, don't you?

MS. daPONTE: [352] [814] It certainly would be fair for you to say that if that's the way you felt.

MR. MAYEUX: No, it wouldn't be fair for me to say that, right.

MS. daPONTE: No, I'm sorry. If you feel that way, certainly it would be fair for you to say it. And I need to know how you feel.

MR. MAYEUX: Well, I believe everyone is entitled to a trial.

MS. daPONTE: Okay.

MR. MAYEUX: Now, –

MS. daPONTE: But that wasn't my question.

Can you presume that he is innocent of the crime of which he's charged?

MR. MAYEUX: Can I presume that he is innocent?

MS. daPONTE: Right.

MR. MAYEUX: No.

MS. daPONTE: Okay. Thank you.

And anybody else feel that way?

Mr. Christiansen, can you presume Mr. Snyder is innocent?

Ms. Angelico?

[353] [815] And what about the legal decisions that – I know a lot of people we talked to about that cannot consider the insanity defense, and I understand that.

What about the other legal decision that we might make as lawyers, can you promise that you wouldn't hold that against Mr. Snyder?

And I've got to tell you, it's nobody up here, in fact I don't even know who said it, but Mr. Vazquez and I walked in a little bit late from the break, and somebody said, I heard them say, you're not scoring any points.

Would you hold something like that, either a legal decision or something that we did, against Mr. Snyder?

MR. LOTTINGER: I'll admit I said that, but that was –

MS. daPONTE: Well, now I know.

MR. LOTTINGER: I wasn't intending – I'd hold that against him.

MS. daPONTE: But you wouldn't hold it against Mr. Snyder?

And does everybody see where I'm going, that the legal decisions that are made in this courtroom, whether we run up and object at the Bench, like we did a few minutes ago and talked to the Judge, could you promise [354] [816] that you'd not hold that against Mr. Snyder? If you're going to hold it against anybody, hold it against us. Could you do that?

If Mr. Snyder does not take the witness stand, – well, let me ask you this. Does anybody feel like there is any way in the world they would not take the witness stand if they were in Mr. Snyder's position? Does anybody feel like you could think of a reason why you wouldn't?

Mr. Powell? Okay.

MR. BUQUET: Yeah, O. J. didn't, why – I mean, why should he take it?

MS. daPONTE: Okay. How did you feel about the fact that O. J. Simpson didn't take the –

MR. BUQUET: I thought he should have gotten on.

MS. daPONTE: Do you think –

MR. BUQUET: And I think it was the lawyer's that made him not go on there. That's my opinion.

MS. daPONTE: And let me ask you how you feel about that, –

MR. BUQUET: I –

MS. daPONTE: – the fact that the lawyer said, don't [355] [817] take the witness stand. How do you feel about that?

MR. BUQUET: I thought it sucked.

MS. daPONTE: Okay. And would you hold that against – you didn't sit on Mr. Simpson's jury, but had you sat on that jury, would you have held that against him because he listened to his lawyers?

MR. BUQUET: No.

MS. daPONTE: You're sure about that?

MR. BUQUET: Yeah. I just didn't like the lawyers.

MS. daPONTE: Okay.

Mr. Powell, how about you, could you think of a reason why you might not testify in your own defense?

MR. POWELL: No, I mean, you couldn't hold it, like you said, against the person legally.

MS. daPONTE: Okay.

MR. POWELL: What, you all – comes through you all reflects on him too, you know.

MS. daPONTE: All right. Could you separate that though, could you not hold that against him?

[356] [818] MR. POWELL: Yeah, to an extent, you know, not – it would depend on what you all did or didn't do.

MS. daPONTE: If I were representing you, Mr. Powell, and I said, this D.A. is tougher than anybody I've ever seen, you should not take the witness stand.

MR. POWELL: I would take your advice, right, you're —

MS. daPONTE: So you understand –

MR. POWELL: – my counsel.

MS. daPONTE: – why somebody might not take the witness stand.

Does everybody feel the same way Mr. Powell does? If not, I need to know.

Mr. Scott, how about you?

MR. SCOTT: Well, you know, I guess, you know, if I were in a situation, and if I were innocent, I guess my ego would tell me I need to get on the witness stand, because I would feel that.

MS. daPONTE: Okay.

MR. SCOTT: You know, I need to present my story.

[357] [819] However, you know, I've never been in a situation like that, and I would have to consider the advice of the lawyers, I think.

MS. daPONTE: What if I said, Mr. Scott, your ego is going to get you in trouble, –

MR. SCOTT: Right.

MS. daPONTE: – you've got to stay off the witness stand.

MR. SCOTT: I think my wife would probably tell me to consider that.

MS. daPONTE: Okay. Can everybody – is there anybody else – Ms. McMurray?

MS. McMURRAY: I think – I feel this way, if you are innocent of the crime that you are accused of, you should be able to get on the stand and state your case.

MS. daPONTE: Okay.

MS. McMURRAY: By not getting on the stand, that proves that you are guilty, –

MS. daPONTE: Okay.

MS. McMURRAY: – and that you have –

MS. daPONTE: [358] [820] I appreciate your honesty.

Mr. Christiansen, you feel anything like that, or could you not hold it against him?

MR. CHRISTIANSEN: I feel somewhat like Mr. Scott, that I would expect the person to take the stand if they were innocent. But I can understand that.

MS. daPONTE: But you can understand that?

MR. CHRISTIANSEN: The lawyer may have advised him not to.

MS. daPONTE: Mr. Licalli, how about you?

MR. LICALLI: I think it's a pretty sad state of affairs when a man cannot defend his own freedom, or his life in this case, by not, you know, by being chewed up by an attorney with Forty Dollar words. I mean, that's what the Fifth Amendment is for. If you feel you're incriminating yourself, I'm not going to answer that.

But, if you are innocent, truly innocent, I think you have an obligation to yourself, and to whoever you believe in, to defend yourself.

And I'm not talking about through fancy lawyers either, I'm speaking from person to person. I mean, that's just an opinion.

MS. daPONTE: I understand. And would you hold it [359] [821] against Mr. Snyder if he didn't?

MR. LICALLI: No, I mean, because the man, at this particular time, I'm sure he's scared to death, and his life is in your hands, so he's going to do what you tell him to do.

If it was me, and I was innocent, I'd be up there – you'd have to stick a cork in my mouth.

MS. daPONTE: Anybody else?

Mr. Mayeux? You're not going to touch that one?

MR. MAYEUX: No. Thank you.

MS. daPONTE: Does – we talked about whether a murder is always a murder, or whether sometimes it's a manslaughter.

Mr. Christiansen, do you believe that there are times when a murder might be mitigated to manslaughter?

MR. CHRISTIANSEN: I'm not sure what the legal –

MS. daPONTE: Mitigated to manslaughter?

MR. CHRISTIANSEN: – requirements are to mitigate to that.

MS. daPONTE: For a manslaughter – for a murder to be mitigated to manslaughter, what you look for, – it's 14:31, and what is says is, "A [360] [822] homicide which would be murder", under either article 30, which is what we're dealing with, first degree murder, or article 30.1, second degree murder, "but the offense is committed in sudden heat of passion, heat" – I'm sorry, "in sudden passion, or heat of blood, immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled at the time the offense was committed."

So, we're not excusing the homicide, we're mitigating it. So we're not talking about a life sentence or a death sentence, we're talking about a term of years that the Judge imposes, because of the passion, because of the heat of blood involved.

Could you consider that?

MR. CHRISTIANSEN: I'd have a hard time mitigating it because of that.

MS. daPONTE: Okay.

MR. CHRISTIANSEN: And I think somebody should be able to maintain certain levels of control to kill somebody.

MS. daPONTE: [361] [823] The – okay. How about the guy in Baton Rouge who shot the guy who had molested his son; is that something that you think is mitigating?

MR. CHRISTIANSEN: That one would be, – yeah, I'd feel a little differently about that one.

MS. daPONTE: How about the woman who's lover had given her AIDS and told her about it?

MR. CHRISTIANSEN: I remember the facts, it was a long time ago. No, I don't think that one would –

MS. daPONTE: But you'd [sic] could consider manslaughter in certain very limited circumstances?

MR. CHRISTIANSEN: Yes.

MS. daPONTE: All right.

Mr. Scott, how about you, could you consider manslaughter, that a murder might be mitigated to manslaughter with the heat of blood?

MR. SCOTT: As you read the Code, it appears that it talks about manslaughter, and it says what is manslaughter and what is first degree murder, I mean, if you present evidence that indicates to me that it's manslaughter, then I would have to consider it. I mean, if

that's what the law says, then that's what [362] [824] I would have to consider.

MS. daPONTE: Okay.

MR. SCOTT: I mean, I don't have a choice.

MS. daPONTE: Okay. And you understand that we're talking about all of the elements for first degree murder could be there, but the Code recognizes that some times that can be mitigated down because of heat of passion.

You're nodding, Mr. Powell, are you following that?

MR. POWELL: Yes.

MS. daPONTE: Okay. You could consider that?

MR. POWELL: It would have to be very strong, but I could consider it.

MS. daPONTE: Okay. All right.

And you understand we're talking about the same exact thing, same exact elements, but it's mitigated by the heat of passion, by the provocation?

MR. SCOTT: Right. I'm just saying, if that's what the Code says, then I would just consider it. I'm not trying to really put my opinion in it, just what the Code says, and I would just act accordingly, based on what it says.

[363] [825] MS. daPONTE: Ms. Angelico, could you consider that a murder might be mitigated down to a manslaughter if it was heat of passion?

MS. ANGELICO: As if with the Baton Rouge case, I could. And I could consider it with the AIDS case also.

MS. daPONTE: Mr. Jacob, how about you, could you consider manslaughter?

MR. JACOB: I think so.

MS. daPONTE: And Mr. Buquet?

MR. BUQUET: Yeah.

MS. daPONTE: Mr. Mayeux?

MR. MAYEUX: I believe you're talking about a insanity plea for manslaughter?

MS. daPONTE: That's a very very good question.

But manslaughter itself does not require evidence of insanity. Manslaughter is when you say I'm so mad I could kill him, and you actually do it. And there is a reason for that hot blood that you as a juror find is sufficient, find that an average person would go off.

MR. MAYEUX: [364] [826] It would be very tough.

MS. daPONTE: And again, we don't send people home for that, they just don't get the life sentence or the death sentence that first degree or second degree murder does. Okay?

Manslaughter would be tough.

Mr. Licalli?

MR. LICALLI: I could consider it.

MS. daPONTE: I just have one more question.

Mr. Licalli, – no, I'm sorry, I'm sorry, I don't, because you made yourself clear when you talked.

All right, that's all I have. Thank you.

MR. VAZQUEZ: Folks, I'm going to try to be as brief as I can.

Mr. Lottinger, assuming you found Allen Snyder guilty of first degree murder, could you consider the imposition of a life sentence as well?

MR. LOTTINGER: No.

MR. VAZQUEZ: No, sir? All right.

The only thing you could consider at that point would be the death penalty?

MR. LOTTINGER: Yes, sir.

[365] [827] MR. VAZQUEZ: Ms. McMurray, same question to you, –

MS. McMURRAY: I can't.

MR. VAZQUEZ: – if you sat on this jury and you found Mr. Snyder guilty of first degree murder, could you consider the imposition of a life sentence?

MS. McMURRAY: No.

MR. VAZQUEZ: You could not?

MS. McMURRAY: No.

MR. VAZQUEZ: There's nothing that I could show to you by way of mitigation, perhaps the way he was

– you know, his life was – he was brought up, maybe he was abused as a child?

MS. McMURRAY: And that –

MR. VAZQUEZ: And I'm not saying that's what's going to be shown.

MS. McMURRAY: That should have no – no problem on that.

MR. VAZQUEZ: So that –

MS. McMURRAY: If he committed murder, cold-blooded; I [366] [828] feel that anybody who commits cold-blooded murder should not get the choice between life or death, they should be automatically put to death.

MR. VAZQUEZ: Okay.

MS. McMURRAY: I'm sorry.

MR. VAZQUEZ: Please don't be sorry. There are no right or wrong, everybody is entitled to their opinion. Thank you.

Mr. Scott, could you consider – and I understand you've indicated you could consider the imposition of the death penalty. Could you also consider the imposition of a life sentence?

MR. SCOTT: Yes.

MR. VAZQUEZ: Ms. Angelico?

MS. ANGELICO: Yes.

MR. VAZQUEZ: You could consider the imposition of a life sentence, as well as the imposition of the death sentence?

MS. ANGELICO: Uh huh.

MR. VAZQUEZ: All right. And you would keep an open mind until the case was sent back to you, to [367] [829] consider both of those options?

MS. ANGELICO: Yes.

MR. VAZQUEZ: Your Honor, if I could have just one moment.

Thank you.

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

THE COURT: All right, challenges –

MR. WILLIAMS: Just a second, Judge.

THE COURT: Okay, challenges for cause?

MR. WILLIAMS: Yes. Ms. Davis could not impose the death penalty.

THE COURT: All right, I'm going to go ahead and excuse Ms. Davis.

MR. WILLIAMS: Okay. Let's see, let's see, let's see, Ms. Calligan could not impose the death penalty? Challenge for cause.

THE COURT: All right, we're going to excuse Ms. Calligan for cause.

MR. WILLIAMS: And that's all I have.

MS. daPONTE: Okay. Mr. Lottinger.

MR. WILLIAMS: [368] [830] No objection.

THE COURT: Excuse Mr. Lottinger.

MS. daPONTE: Mr. Licalli.

MR. WILLIAMS: Who?

MS. daPONTE: Mr. Licalli.

MR. WILLIAMS: No objection.

THE COURT: Excuse Mr. Licalli.

MS. daPONTE: Ms. McMurray.

MR. WILLIAMS: No objection.

THE COURT: Excuse Ms. McMurray.

MS. daPONTE: Ms. Isacks.

MR. WILLIAMS: No objection.

THE COURT: Who's the other one?

MR. WILLIAMS: Ms. Isacks, up here.

THE COURT: Okay, we're going to excuse Ms. Isacks.

MR. WILLIAMS: She said, no to everything.

MS. daPONTE: [369] [831] Mr. Mayeux, she said I've made my mind up.

MR. WILLIAMS: No objection.

THE COURT: We're going to excuse Mr. Mayeux.

MS. daPONTE: Mr. Jacob.

MR. WILLIAMS: No objection.

THE COURT: All right, Mr. Jacob, we're going to excuse him.

MR. WILLIAMS: Peremptories, the State accepts Mr. Christiansen.

MS. daPONTE: Accepted.

THE COURT: Accepted.

MR. WILLIAMS: The State excuses Mr. Scott.

The State excuses Mr. Buquet.

MS. daPONTE: I just need to note Mr. Scott is African American. I'd note that for the record. I'm not asking for anything.

MR. WILLIAMS: The State accepts Mr. Buquet.

MS. daPONTE: Buquet?

MR. WILLIAMS: [370] [832] Buquet is acceptable.

MS. daPONTE: Excused.

MR. WILLIAMS: Four?

MS. daPONTE: Uh huh.

MR. WILLIAMS: The State challenges Mr. Powell.

The State accepts Ms. Angelico.

MS. daPONTE: She's acceptable.

MR. WILLIAMS: I'm sorry?

MS. daPONTE: Accepted.

MR. WILLIAMS: Good.

(DISCUSSION OFF THE RECORD)

(END OF CONFERENCE)

THE COURT: All right, the Court would like to thank and excuse everyone on this panel, with the exception of Mr. Christiansen and Ms. Angelico.

All right, with the exception of Mr. Christiansen and Ms. Angelico, everyone else is excused now for today. You are to report back here for 9:00 a.m. tomorrow morning.

A JUROR: Downstairs?

THE COURT: [371] [833] No, to court – this courtroom at 9:00 a.m. tomorrow morning.

THE COURT: Would counsel approach?

(THE FOLLOWING IS A CONFERENCE AT THE BENCH)

THE COURT: This gentleman has to go to court tomorrow, he has a court date tomorrow. Where is it at?

MR. DUBQUE: I'm sorry?

THE COURT: Where is it at?

MR. DUBQUE: I don't have the date with me.

The only reason I remembered, was my lawyer had beeped me when I was out on break, and that's how I –

MR. WILLIAMS: Who is your lawyer?

MR. DUBQUE: Romi Gonzales.

MR. WILLIAMS: Is it a civil case you have, or a criminal case, or is it a domestic case?

MR. DUBQUE: It's a civil case.

MR. WILLIAMS: Whose court?

MR. DUBQUE: First uh, I forgot.

MR. WILLIAMS: [372] [834] Where is the court?

MR. DUBQUE: I don't know.

I can get my lawyer on the phone if you'd like to talk to him.

You see, I have a parts store, a mechanic shop, and someone is suing me.

MR. WILLIAMS: And where is your store located?

MR. DUBQUE: St. Claude Avenue, 6411 –

MR. WILLIAMS: So you've got to go to New Orleans Court?

MR. DUBQUE: Yes.

MR. WILLIAMS: Downtown, Loyola Avenue? You've not been there before?

MS. daPONTE: And that's tomorrow?

MR. DUBQUE: Tomorrow.

THE COURT: The case is set for trial?

MR. DUBQUE: Excuse me?

THE COURT: It's set for trial?

MR. DUBQUE: Yes, sir.

MS. daPONTE: [373] [835] No objection.

THE COURT: Any objection?

MR. WILLIAMS: No.

THE COURT: Okay. We're going to go ahead and excuse you.

MR. DUBQUE: Thank you.

So, I can go?

THE COURT: Yeah. Give them your name.

(MR. DUBQUE LEFT THE BENCH)

MS. BISHOP: Cynthia Bishop.

THE COURT: Yes, you recognize me?

MS. BISHOP: I do, I didn't recognize him at first because it was eleven years ago. And the more I sat in this courtroom and I looked at him, and I looked at him, and I said, I think that's the same attorney –

MS. daPONTE: Oh, you knew him?

MS. BISHOP: – that recommended my family.

Yeah. He represented the family eleven years ago on a murder trial, my sister was murdered.

THE COURT: [374] [836] Okay.

MS. BISHOP: In Orleans Parish.

MS. daPONTE: Do you think that's going to –

MS. BISHOP: Well, –

THE COURT: Yeah.

MS. BISHOP: Yeah, I really think it would.

MS. daPONTE: Thank you for telling us.

THE COURT: All right, we're going to go ahead and dismiss you.

MS. BISHOP: Okay.

THE COURT: You don't' have to –

MS. BISHOP: Do I need a thing showing that I was here today?

THE COURT: Just give them the information.

MR. DONNES: Tomorrow morning – I just heard of something today, I won't know until tomorrow morning, but I may have a problem at 3:30, as far as I'm it, because I'm the only agent.

THE COURT: [375] [837] Well, let's – why don't we wait until tomorrow morning and see if you have the problem.

MR. DONNES: All right.

THE COURT: Because you may not have the problem.

MR. DONNES: All right.

THE COURT: And we'll know by noon probably whether we have a jury or not.

MR. DONNES: By noon?

THE COURT: We should know –

MR. DONNES: If by noon I'll be out of here, noon is not a problem.

THE COURT: All right.

MR. DONNES: See you at 9:00 o'clock.

THE COURT: Yes.

MS. daPONTE: Thank you.

MR. DONNES: Good night.

THE COURT: Swear in the jurors.

(THE JURORS WERE SWORN)

[376] [838] THE COURT: All right, we're going to go ahead and break today.

We're going to begin jury selection again at 9:00 a.m. tomorrow morning.

Hopefully by noon we should have the jury picked and we can start the case in the afternoon.

The rules of sequestration are going to apply, so they will bring you to the hotel – what is it, the Travel Lodge, Roy?

THE DEPUTY: The Travel Lodge, that's it.

THE COURT: The Travel Lodge, and you'll be allowed to call home and all, but you're not to talk about the case, or watch any news reports, or newspaper accounts, or radio, listen to the radio or anything, or to discuss the case with anyone. Okay?

And they'll bring you back here tomorrow after they feed you breakfast, and bring you back here, I guess, about

8:30. We're going to begin at 9:00. Okay? All right, we're going to go ahead and recess now until 9:00 a.m. tomorrow morning.

(THERE UPON THE PROCEEDINGS CONCLUDED)

[377] [839] **CERTIFICATE**

I, Linda LaBorde, Certified Court Reporter, do hereby certify that the foregoing is a true and correct transcript of the proceedings heard in open court at Gretna, Louisiana, on August 27, 1996, before they Honorable Kernan A. Hand, Judge presiding, in the matter entitled, State of Louisiana versus Allen Snyder, number 95-5114.

/s/ Linda LaBorde
Official Court Reporter
24th Judicial District Court
In and For the Parish of Jefferson
State of Louisiana

80

(11)

No. 06-10119

Supreme Court, U.S.
FILED
SEP 5 - 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

ALLEN SNYDER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ Of *Certiorari* To The Supreme Court Of Louisiana

JOINT APPENDIX
Volume II, Pages 352 to 808

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[Voir Dire (Continued)]

[1] [840] **TWENTY-FOURTH JUDICIAL DISTRICT COURT**

PARISH OF JEFFERSON

STATE OF LOUISIANA

****

THE STATE OF LOUISIANA NO. 95-5114

vs. DIV. "H"

ALLEN SNYDER

****

Testimony and proceedings taken in the above numbered and entitled cause, for the purpose of Voir Dire, in open court on Wednesday, August 28th, 1996, before the Honorable Kernan A. Hand, Judge presiding.

(Filed Nov. 25, 1997)

* * *

APPEARANCES:

For the State:

JAMES A. WILLIAMS
ALFRED OLINDE

For the Defendant:

GRAHAM DAPONTE
CAESAR VASQUEZ

Reported by: Kerry B. Westmoreland, CCR
Official Court Reporter

[2] [841] **WITNESS INDEX**

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[3] [842] **EXHIBIT INDEX**

EXHIBITS: DESCRIPTION PAGE RECEIVED:

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DEFENDANT'S EXHIBIT

[4] [843] **PROCEEDINGS**

THE COURT: All right. Please draw up 13 more names at random.

Before y'all come up, they appear to have waxed the floor right here in the front, so be very careful as you're walking up. It is extremely slippery.

THE CLERK: Number 247, Thomas Hawkins, Jr.
Number 390, Robert J. Moore.
Number 456, Karen W. Primeaux
Number 472, Ann M. Rizzo
Number 455, Jessika Mari Prem.
Number 10, Shannon G. Alvarez.
Number 218, Wilma C. Goff.
Number 153, Kathleen L. Dubois.
Number 449, Jesse Pollard.

THE COURT: Call another one.

THE CLERK: Number 495, Frances Saracione.

Jesse Pollard didn't answer.

MR. WILLIAMS: Approach the bench.

That might be him now.

THE COURT: That might be him now.

Jesse Pollard? No.

MR. WILLIAMS: This doesn't need to be on the record.

(Colloquy at bench.)

THE COURT: Is Jesse Pollard in the courtroom?

[5] [844] All right. Let's issue an attachment for his arrest.

MR. OLINDE: Who's 495? I'm sorry.

THE CLERK: Frances Saracione, S-A-R-A-C-I-O-N-E.

MR. OLINDE: Thank you very much.

THE CLERK: 496, Michael Sualino.
504, Elaine Scott.
Number 510, Santosh C. Shah, S-H-A-H
Number 70, Wilson J. Breaux, Jr.

THE COURT: Okay, Ladies and Gentlemen. These proceedings are being recorded; so, please speak loudly and clearly. I will begin by asking each of you to give your full name, address, occupation, marital status and the number and ages of your children, if any. If you are married, please tell us your spouse's occupation, if your spouse is employed outside the home.

Let's begin with you, sir.

MR. HAWKINS: My name is Thomas Hawkins, Jr. I live at 6165 Ray Street, Marrero. I'm married. I have three children. My wife works a [sic] Eyes, Ears, Nose and Throat Hospital as a coder. I'm employed by Shell Oil Refinery. I'm a ship foreman. I have three children: 27, 25, and 22.

MR. MOORE: Robert J. Moore. I'm employed at the [6] [845] Treasure Chest Casino, box man on craps games. My wife is a registered nurse at east Jefferson. We have two children, 24 and 21.

MS. PRIMEAUX: My name is Karen Primeaux. I live at 605 Ronson in Kenner. I'm a medical lab assistant. My husband is a builder.

MS. RIZZO: Ann Rizzo. I live at 4900 Janice Avenue in Kenner. I'm a registered nurse at St. Charles General Hospital. My husband has his own air-conditioning and heating business. We have three children: 13, 15, and 17.

MS. PREM: Jessika Mari Prem. I live at 804 Joe Yenni Boulevard in Kenner. I am single. I'm a secretary at Gertrude Gardner.

MS. ALVAREZ: Shannon Alvarez. I live at 1104 North Atlanta Street. I'm single, no children, and I'm employed at an offshore company.

MS. GOFF: Wilma Maria Goff. I work at the Corps of Engineers. I'm married. I live at 1308 Carnation Avenue. My husband, John, works for Mobile Refinery. I have two children, 34 and 31.

MS. DuBOIS: I'm Kathleen DuBois. I live at 513 Oak Avenue. I'm a clinic medical records two and I have no children.

MS. SARACIONE: [7] [846] I'm Frances Saracione. I live at 156 Valerie, River Ridge. I have two children, one, 44 and one, 24, and my husband's deceased, and I work for the Jefferson Parish School Board and Wal-Mart.

MR. SAULINO: Mike Saulino, 565 Diplomat Street in Terrytown, Louisiana. I'm a builder in West Virginia, and I have a air-conditioning and heating – as a contractor here in Louisiana. My wife helps with the business, and I have three children: 21, in college, 16 and 15.

MS. SCOTT: I'm Elaine Scott and I'm a mother/finance clerk. I'm married. I have two sons, ages 18 and 8, and I live in Marrero. My husband is also an AT&T.

MR. SHAH: I'm Santosh Shah. I live at 3829 Deercreek Lane in Harvey. I'm an engineer. I'm married and I have two children, ages 12 and 15.

THE COURT: What does your wife do, sir?

MR. SHAH: Housewife.

THE COURT: Okay.

MR. BRIEUX: My name is Wilson J. Breaux, Jr. I work at Lakeland Machinery. My wife is a [8] [847] housewife. I live at 537 Michael Street in Marrero, and I have two kids, one, 29 and one, 22.

THE COURT: Please answer the questions of the attorneys.

MR. OLINDE: May it please the Court, Ladies and Gentlemen, my name is Alfred Olinde, Jr. and along with Jim Williams, I also represent the State of Louisiana in this case. I thank all of you for your patience yesterday, for sitting through all of this. You all know it's an important process, and I'm sure everyone remembers what was said yesterday. Just with a show of hands here, does everyone remember what Mr. Williams said about what first degree murder was, that crime? Does everyone remember what that crime was? Okay, then we'll move along.

Does everyone here remember, as Ms. DaPonte and Mr. Williams told you, that this process is going to be like two trials, potentially? The first trial would be to determine whether or not Allen Snyder is guilty of first degree murder, and then the second part, if you reach that phase, will go into a penalty phase and the second trial will start. And you'll hear more evidence from the State of Louisiana, and the defense at that time will have an opportunity to put on evidence. In that second trial, you would [9] [848] determine whether he should receive life imprisonment or the death penalty. Everybody's with me, what happened yesterday?

With that said, I'd like to immediately ask the questions that were asked yesterday and take the assumption that you've sat on this jury, you've heard all of the evidence, and it's tough to do since you don't know what the evidence is yet in this case. After hearing all of the evidence, you, as a member of that jury, along with the rest of

your jurors, said, Okay, we believe Allen Snyder is guilty of first degree murder. At that point, you're ready to enter the penalty phase.

Entering the penalty phase, Mr. Hawkins, sir, and I'm going to preface this by saying I'm not asking anybody to answer other than their honest answer. If you are personally and morally, religiously, philosophically against the death penalty, tell us that. You heard the New Orleans Police Officer yesterday who said that. That's what we need to know.

Mr. Hawkins, sir, could you consider the imposition of the death penalty upon Allen Snyder if you were selected as a juror in this case?

MR. HAWKINS: Yes.

MR. OLINDE: [10] [849] Mr. Moore?

MR. MOORE: No, I could not.

MR. OLINDE: Is it because of a longstanding religious, personal, or moral belief that you hold?

MR. MOORE: Religious and moral, yes.

MR. OLINDE: Okay. And regardless of what evidence you would hear from our side, can you ever envision a set of facts or circumstances which would cause you to change your mind on that topic?

MR. MOORE: No, I could not.

MR. OLINDE: Thank you, sir, for your honesty. Ms. Primeaux?

MS. PRIMEAUX: Yes.

MR. OLINDE: You could consider the imposition of the death penalty on Allen Snyder?

MS. PRIMEAUX: Yes.

(Court Reporters requests prospective juror speak up and repeat what was said.)

MS. PRIMEAUX: Yes.

MR. OLINDE: She said yes.

Ms. Rizzo, if you found him guilty of [11] [850] first degree murder, could you consider the imposition of the death penalty?

MS. RIZZO: Yes, I could.

MR. OLINDE: Ms. Alvarez – I'm sorry, Ms. Prem, if you found him guilty of first degree murder, could you consider the imposition of the death penalty?

MS. PREM: Yes.

MR. OLINDE: Ms. Alvarez, if you found Allen Snyder guilty of first degree murder, could you consider the imposition of the death penalty?

MS. ALVAREZ: No. Under no circumstances, no.

MR. OLINDE: Is this because of a longstanding moral, religious or personal –

MS. ALVAREZ: Yes, sir.

MR. OLINDE: And can you envision any set of facts or circumstances which would cause you to change your mind in that regard?

MS. ALVAREZ: No, I can't.

MR. OLINDE: Ms. Goff, could you consider the imposition of the death penalty on Allen Snyder if you found him guilty of first degree murder?

[12] [851] MS. GOFF: Depending – Yes, I guess I could.

MR. OLINDE: Ms. DuBois, could you consider the imposition of the death penalty if you found Allen Snyder guilty of first degree murder?

MS. DuBOIS: Yes.

MR. OLINDE: I'm going to have a little problem with your name.

MS. SARACIONE: Saracione.

MR. OLINDE: Thank you very much.

If you found Allen Snyder guilty of first degree murder, could you consider the imposition of the death penalty?

MS. SARACIONE: Yes.

MR. OLINDE: Mr. Saulino, sir, if you found Allen Snyder guilty of first degree murder, could you consider the imposition of the death penalty?

MR. SAULINO: Yes, sir.

MR. OLINDE: Ms. Scott, could you consider imposing the death penalty on Allen Snyder if you found him guilty of first degree murder?

MS. DaPONTE: I'm sorry, I can't hear you.

[13] [852] MS. SCOTT: I think I could.

MR. OLINDE: Mr. Shah?

MR. SHAH: No, sir.

MR. OLINDE: Is this based upon a longstanding personal, religious or moral belief that you hold, sir?

MR. SHAH: Yes, sir.

MR. OLINDE: And is there anything that I could say or Mr. Williams could say or anyone could say that could cause you to change your mind?

MR. SHAH: No.

MR. OLINDE: Mr. Breaux, if you found Allen Snyder guilty of first degree murder, could you consider imposing the death penalty?

MR. BREAUX: Yes, I could.

MR. OLINDE: I have the reverse question to ask of everybody, and I want everyone to put out of their minds anything you've heard about this case yesterday which would cause you to think you believe you know what happened in this case, because no one has heard any evidence yet. I want to talk about the mitigating circumstances in the [14] [853] second part of the trial that you would hear. The law says you are to consider mitigating circumstances as well as aggravating circumstances when deciding whether or not to impose the death penalty. If you find him guilty of first degree murder, you've already found an aggravating circumstance; so, you'd be entitled to impose the death penalty if you so desired.

The word "consider" for mitigating circumstances means to listen to the evidence and decide whether or not you, as a juror, accept or reject that mitigating evidence, and I want to briefly do one hypothetical so that you guys can understand exactly what the Louisiana Legislature meant when they said consider mitigating circumstances. They were fair in giving you the long list of all the mitigating circumstances. I'm going to pick one of them.

Domination or control of another person is a mitigating circumstance. Now, if you heard evidence of domination or control where these guys got together, Ms. Prem, and they decided to rob an elderly lady as she was taking her Social Security check back from the Social Security office and the guy with the gun, the other two guys are going, Go ahead and kill her. Go ahead and kill her. That's a good idea. He came in and said, well, I was under the domination and control of some other [15] [854] people, after he pulled the trigger. You could consider that evidence and decide whether or not you said, Okay, I believe that, or Okay, I think that's ridiculous. I'm not going to accept that. Could you consider it that way, decide whether or not you believe that applied or didn't apply?

MS. PREM: I could consider it –

MR. OLINDE: Okay.

MS. PREM: – but I don't think I could believe that.

MR. OLINDE: Okay. And that is the threshold question in the hypothetical. Considering doesn't mean believe, and it doesn't mean not believing. It means listening and deciding.

Another hypothetical question, and I want you to assume all of this is true: A man is called by his wife over the telephone, and she tells her husband, Honey, some people have just kidnapped me and the children, and they want you to go out and kill somebody, and this guy doesn't know what's going on, and he's listening on the telephone, and the person gets on there and says, What your wife is telling you is the truth, and I want you to know that we're serious. I want you to go out and kill this guy who's going to be [16] [855] out there, who's going to be testifying against me in a trial. I'm not going to tell you who I am, but he's going to testify against me in a case where I'm a criminal defendant, and to show you that our intentions are serious, I'm going to kill your son right now, one of your kids. And you hear over the phone – The guy hears a gunshot. The wife gets on the phone and says, Honey, our son is dead. One of our sons is dead.

This person has a time limit to go out and kill this person who's going to testify against him. He's got 30 minutes to decide whether he can do that or not, and the man decides I love my family. I love my wife. I did not ask for these circumstances to be brought upon me, but they were, and for the love my children and my wife, I'm going to go out and kill that innocent person who's going to testify against that guy. And he decides to do it for those reasons. He comes to trial; he sits in this chair and he tells you, Ladies and Gentlemen, this is why I did this: I killed that man. I killed him for my wife. I killed him for my children. I was under the domination or control of another.

In Louisiana there is no defense of compulsion for murder. You cannot murder someone else because you were totally dominated by another. Even if those sets of facts are true, you listened to that [17] [856] evidence that

was rendered, you believed it, that person is still guilty of murder, of first degree murder, and you believed, after listening to the evidence of his reasons for why he did what he did, you considered it, and let's say in this hypothetical question, you actually did believe that, that he was under that kind of domination or control, does everybody understand now why you can't make your mind up on the death penalty or not the death penalty without hearing exactly what happened and exactly what the circumstances are? You have to listen to the evidence before you can decide whether you can consider something and believe it or not consider something and believe it.

Mr. Hawkins, do you feel you've understood what I've said about mitigating circumstances and the way they apply?

MR. HAWKINS: Yes.

MR. OLINDE: Could you consider a sentence of life imprisonment if you heard and believed mitigating circumstances which would cause you to think maybe life is appropriate in a particular case?

MR. HAWKINS: I can consider it, yes.

MR. OLINDE: And, Ladies and Gentlemen, it's not this case. It's any case in any forum, that's all that counts. And you can say [18] [857] in any particular case. All right, I've heard one aggravating circumstance, and I think this a first degree murder, and I've heard six or seven mitigating circumstances, and I believed four of them and I disbelieved three of them, but I'm still going to impose the death penalty. No one can tell you how to weigh mitigating circumstances against aggravating circumstances. There could be nine that you listen to and

believe and decide, Okay, even with these, I'm going to impose the death penalty.

The thing you can't do, is just go like this and say, I can't listen. I can't evaluate. I can't consider if it's a first degree murder. There's no hypothetical, even the one that you told me where I would impose the death penalty.

MS. DaPONTE: Judge, I'm going to object.

Certainly, the juror can do that. That juror just would not be appropriate to sit.

MR. OLINDE: That's correct. If you were the kind of juror who would do that, you would not be appropriate to sit.

MS. DaPONTE: Thank you.

MR. OLINDE: Mr. Moore, could you also consider a sentence – I'm sorry. You said you could not consider the death penalty; is [19] [858] that correct?

MR. MOORE: That's correct.

MR. OLINDE: All right.

Ms. Primeaux, could you consider, under certain circumstance which you haven't heard yet, the possibility of a life imprisonment, even the hypothetical that I gave?

MS. PRIMEAUX: No. No.

MR. OLINDE: You could not? Even in the situation where someone was thrust into a situation that they didn't choose to be in?

MS. PRIMEAUX: No.

MR. OLINDE: Okay. I won't go any further.

Ms. Rizzo, could you consider life imprisonment as well as the death penalty under certain circumstances?

MS. RIZZO: Yes, I could.

MR. OLINDE: Ms. Prem, did you understand the hypothetical I gave earlier about the man and his wife and his children?

MS. PREM: I think I could, but it would have to be under real extreme circumstances.

MR. OLINDE: And the law is only if you could, if [20] [859] under real – Even – No one can tell you whether to or whether not to. I can't tell you you have to, and they can't tell you you can't.

MS. PREM: I personally – I'm against life imprisonment and towards the death penalty.

MR. OLINDE: The question is not whether you lean towards one or the other. It's whether under certain circumstances you could consider a sentence of life imprisonment, and that's the question. You heard the hypothetical that I gave about the man who is thrust into circumstances beyond his control. Throw in some other mitigating circumstances. Say, the guy's never spit on the sidewalk before, never gotten a traffic ticket before. There are tons of mitigating circumstances you could possibly hear.

MS. PREM: I'd have to say, no.

MR. OLINDE: Okay. You don't think there's any situation where you could not impose the death penalty for murder?

MS. PREM: Unh-unh (negative reply).

MR. OLINDE: Ms. Alvarez, you said that you could not impose the death penalty.

Ms. Goff?

[21] [860] MS. GOFF: I could consider the death penalty.

MS. DaPONTE: I'm sorry, I couldn't' hear.

MR. OLINDE: You could consider both?

MS. GOFF: Yes, I would consider it.

MR. OLINDE: Ms. DuBois?

MS. DuBOIS: I could consider it, yes.

MR. OLINDE: Ms. Saracione?

MS. SARACIONE: I could consider it.

MR. OLINDE: Mr. Saulino, sir?

MR. SAULINO: I could consider it.

MR. OLINDE: Ms. Scott?

MS. SCOTT: I could.

MR. OLINDE: Mr. Shah?

MR. SHAH: No.

MR. OLINDE: You said you couldn't consider it?

MR. SHAH: I'd consider it.

MR. OLINDE: Everyone heard Mr. Williams yesterday. [22] [861] It says murder in Louisiana, there's no requirement of premeditation. Can everyone accept that?

Now, you heard a lot of things yesterday about there could be possible defenses in this case, and you really heard the entire board: You heard not guilty, not guilty by reason of insanity. You heard people talk about manslaughter. No one's asking you at this point in time to put those things together and try and figure out what this case is or is not about.

You heard Mr. Williams, yesterday, tell you that if you go not guilty by reason of insanity, for that particular plea, the law imposes a heavy burden upon you, if you do that. First of all, unlike in any other case, you've got to prove by a preponderance of the evidence that you were legally insane, and the higher burden, even, is proving that you're legally insane.

You can listen to psychiatrist say you can be schizophrenic. You can be really, really crazy, but it doesn't mean necessarily that you're legally insane, and legally insane, the only way you can be legally insane is if you – You have a mental defect which prevents you from appreciating the difference between right and wrong. That's the only way that insanity flies in the defense for any case, including murder. And I'll also [23] [862] tell you that if you are legally insane and the jury would find someone not guilty by reason of insanity, they don't walk on the streets if they're dangerous. They go to a forensic facility where a psychiatrist determines how long they're kept there.

MS. DaPONTE: I object, Your Honor. Actually, it's the Judge who determines how long they're kept there.

MR. OLINDE: That's fine. I agree with that.

Based upon many years.

Mr. Hawkins, do you understand exactly how someone who pleads not guilty by reason – Do you understand what that burden is?

MR. HAWKINS: I understand when you're describing it – The way you describe it, I understand.

MR. OLINDE: They've got to prove to you that he did not know the difference between right and wrong, not that he's crazy; that's not it. Legally insane, didn't know the difference, can you hold him to that burden?

MR. HAWKINS: I have to consider it.

MR. OLINDE: Can you hold them to the burden of having to show he didn't know the difference between right and wrong? [24] [863] That's the law. If you can't hold him to that burden, then I need to know that, if you would consider insanity for something lesser than that.

MR. HAWKINS: I have to – I have to consider it. I couldn't say I'd hold him to it. I'll consider it. I have to hear the evidence. I don't know.

MR. OLINDE: Okay. Hearing the evidence, but you have to apply it to the law; you could hear the evidence, you make your mind on, on what the evidence is.

MR. HAWKINS: Right.

MR. OLINDE: Okay. But the law says after hearing the evidence, they have to prove that he didn't know the difference between right and wrong, and we're entitled to have them have to prove that before you say not guilty by reason of insanity. Do you follow me?

MR. HAWKINS: Yeah.

MR. OLINDE: Can you do that?

MR. HAWKINS: No.

MR. OLINDE: So, you can't hold them to that burden, then?

MR. HAWKINS: [25] [864] I'm going to have to consider it. I don't know about that.

MR. OLINDE: Ms. Rizzo, you've heard what I've had to say about insanity and what that burden that they have is. Can you hold them to having to show you that before you can find someone not guilty by reason of insanity?

MS. RIZZO: Yes.

MR. OLINDE: And let me say this, also, Ladies and Gentlemen, insanity is just like mitigating circumstances in the penalty phase. It never requires you to believe it. You have to listen to the evidence and consider whether you accept it or reject it, whether that person knew the difference between right and wrong. That's up to you: Listen, consider, accept or reject. Can you do that?

MS. RIZZO: Yes, I can.

MR. OLINDE: Ms. Goff, can you hold them to that burden of showing that he didn't know the difference between right and wrong and proving that? Can you hold them to that burden?

MS. GOFF: I guess. I don't know if I really believe in that defense or not, but I guess I could consider it.

[26] [865] MR. OLINDE: And you've heard what I've said about listening and accepting or rejecting? The law says if they're able to show you and convince you that he did not know the difference between right and wrong, that's not guilty by reason of insanity; and then the Judge takes whatever action he has to take.

And the question is: The judge tells you that's the law, and you have to apply it; can you do that? Ms. DuBois, can you hold them to the burden of showing he didn't know the difference between right and wrong, not that he's crazy or not that there's something wrong with him, but that he didn't know the difference between right and wrong. That's legal insanity. Can you hold him to that burden?

MS. DuBOIS: Yes.

MR. OLINDE: Can you listen to evidence and consider whether to accept it or reject it?

MS. DuBOIS: Yes.

MR. OLINDE: Ms. Saracione, you've heard what –

MS. SARACIONE: I could.

MR. OLINDE: You could do the same?

MS. SARACIONE: [27] [866] Uh-huh (affirmative reply).

MR. OLINDE: Mr. Saulino?

MR. SAULINO: Yes, sir.

MR. OLINDE: Ms. Scott?

MS. SCOTT: Yes.

MR. OLINDE: Mr. Breaux?

MR. BREAUX: Yes.

MR. OLINDE: You heard Ms. DaPonte mention to you about the word manslaughter. Does everybody think they know what a manslaughter is?

And I think she was fair in her reading of the definition yesterday. I just want to make sure that people are able to appreciate the difference between manslaughter and murder. In order for something to be a manslaughter, there has to be sufficient provocation that would deprive an average person to lose their self-control and cool reflection. In other words, you would have to say, I think an average person, given this provocation and given the amount of time that they had to react to that provocation, may have done the same thing. An average person would do the same thing under those circumstances.

[28] [867] That's what a manslaughter is. It doesn't mean I got mad and I killed somebody, and my blood was boiling hot and, therefore, it's a manslaughter because I got mad.

Do you understand that, Ms. Rizzo?

MS. RIZZO: Yes.

MR. OLINDE: It has to be provocation that an average person would do the same thing under those sets of circumstances with that amount of time to react. Can everybody agree on that?

You heard Ms. DaPonte talk about domestic violence. I'm not going to ask everybody whether or not they, themselves, or had someone close to them who's been a victim of domestic violence. You know whether you have or

you haven't. The question is, is whether or not you can listen to evidence in this regard.

Now, she's told you that we're going to introduce some evidence of that in our case in chief, and you know that we're going to do that. We still have to prove that to you. Well, that may be totally – In fact, when the trial starts, they may say that's totally false, none of that happened. That's our burden. If we say that that happened, we've got to prove that that happened. Don't assume that anything happened yet. You haven't heard any evidence on that, okay? Don't make [29] [868] any assumptions that anything like that ever happened.

And Ms. DaPonte told you that we could use it for motive and intent. There are a couple – which is substantially correct, – and there are a couple of other things we could use it for: absence of mistake, to show that this was no mistake.

MS. DaPONTE: Judge, I'm going to object. It's been announced what this evidence is to be used for, and I don't think that Mr. Olinde needs to get into the reason it could be used.

THE COURT: Objection sustained.

MS. DaPONTE: Thank Your Honor.

MR. OLINDE: Very well, your Honor.

Really, I – What you can't use it for is to say, Okay, I believe someone abused their spouse, ergo or thus, they must have committed a first degree murder. You cannot do that. That's the one thing you cannot do. But you can use that evidence in deciding motive and intent and whether

this is the kind of person who did this particular crime and use it in connection with other evidence that you might hear in the trial. You can put these two bridges together. You can't say, Someone's a domestic abuser; therefore, they're a murderer. [30] [869] Everybody understand what you can and cannot use that for? Anybody have any problems with that?

It was talked about yesterday, was a right to remain silent – well, before I go on, has anyone on the panel here, just by a raise of hand, and you can go to the bench if it's something private, have anyone who is a close friend of theirs or they, themselves, victims of domestic violence which would say, Hey, I can't listen to you. I can't even listen to evidence on that. I can't be fair. Is there anybody like that here?

Okay, Ms. Prem. Is it something that you would like to talk about with the Judge, or can you –

MS. PREM: My mother with my dad, –

MS. DaPONTE: I'm sorry, I couldn't hear you.

MS. PREM: – My mother with my dad, and I don't think I could be fair if I was to be a juror.

MR. OLINDE: All right. I won't even go any further with you on that, then.

You heard, yesterday, about the right to remain silent and presumption of innocence. And what that means, Ladies and Gentlemen, is not presuming we're wrong about the charge. That will come to light when you hear the evidence, whether [31] [870] we're right or we're wrong, but what it does mean is that Allen Snyder starts the trial with a clean slate, and you can't presume he's

guilty of anything until you've heard sufficient evidence to show you that he's guilty of something. Everybody understand? That's what presumption of innocence means. It doesn't mean we're right or wrong. At this point in time, you don't know. It means he starts with a clean slate, and you can't presume him guilty until you've heard evidence to justify that. Everybody follow that?

The last thing I want to talk about, in addition to the presumption of innocence, that any person in America has, every person in America also has the right to remain silent. And the reasons why someone may choose to remain silent or take the witness stand are irrelevant; I'll tell you that. It doesn't matter whether their attorney advises them to or there's some other reason why they decide not to. That doesn't matter. The matter is: They have the right to make us prove our case and not take the witness stand.

Does anybody have feelings against that Fifth Amendment Constitutional Right to where you can't be a fair juror, just by a raise of the hands? I'm not going to ask everybody, but tell me if you do, because we need to talk about it.

So everyone can give someone their [32] [871] Fifth Amendment Right; is that correct?

Ladies and Gentlemen, is there anything that was said yesterday by any of the lawyers in this case, both for the State or the Defense, that you have a question about, before I sit down? Is there anything that I failed to ask anybody or that they're confused about or need any clarification on?

Mr. Williams has told me I forgot about one thing, prior jury service. Who sat on a jury before?

Okay. What kind of case was that, a civil or a criminal case, Ms. Goff?

MS. GOFF: Criminal.

MR. OLINDE: And were you the foreperson of that jury?

MS. GOFF: No, sir.

MR. OLINDE: Not what your verdict was, but do you remember what the verdict in the case was?

MS. GOFF: Guilty.

MR. OLINDE: And what kind of case was it?

MS. GOFF: Murder.

MR. OLINDE: First degree or second degree?

MS. GOFF: First degree.

[33] [872] MR. OLINDE: Did you all go into the penalty phase? If it was a first degree murder, then you went on to decide life or death?

MS. GOFF: Right.

MR. OLINDE: What was the ultimate conclusion?

MS. GOFF: Life.

MR. OLINDE: And was that a unanimous verdict?

MS. GOFF: Yes.

MR. OLINDE: Do you remember what the aggravating circumstance was in that murder case?

MS. GOFF: A man murdered his wife. She wouldn't let him see his children, and the reason he just got life was because his in-laws pleaded for his life.

MR. OLINDE: Okay. And you, along with the other jurors, felt that that was sufficient?

MS. GOFF: Yes.

MR. OLINDE: Anybody else? Anything else?

Ms. Goff, after being involved in that process that you sat – How long ago was it?

MS. GOFF: About 12 years ago.

[34] [873] MR. OLINDE: Do you think that you would be comfortable sitting on another one of these cases? Would that –

MS. GOFF: I'd rather not.

MR. OLINDE: After being through it one, going through it one time, –

MS. GOFF: No.

MR. OLINDE: – do you feel that this process might wear you – This process might wear you down, though? I just want to –

MS. GOFF: Like I said, I'd rather not. If I had to, I will, you know. I think I could be fair, but I'd rather not do it again because we were sequestered.

MR. OLINDE: Let me ask you this question and you can envision what will be coming once, if and when we

get to the penalty phase in this case, what you're going to hear. It's obvious that we're going to ask you to impose the death penalty and put on evidence. It's obvious that they're going to beg for his life and tell you not to impose the death penalty. Can you envision, knowing what the process is about and knowing how that case turned out, I'm not going to equate that case with this case, is there a possibility [35] [874] that you could impose the death penalty, having sat through that process once and knowing what's coming your way?

MS. GOFF: Yes.

MR. OLINDE: You think so?

MS. GOFF: Yes.

MR. OLINDE: Thank you, Ladies and Gentlemen.

MS. DaPONTE: Good morning, Ladies and Gentlemen. Thank you for being back.

I'm going to try to be as short as Mr. Olinde was. I think everybody had a great grasp of what went on yesterday.

Mr. Hawkins, I'd like to start with you. I was a little bit confused about what Mr. Olinde was actually asking you, and I'm not sure – I'm not sure I got it straight. Mr. Olinde asked you if Mr. Snyder's plea is not guilty and not guilty by reason of insanity, before you find him not guilty by reason of insanity, will you make me prove that he was insane? Because that's the burden. The burden goes to me. If I want you to find him not guilty by reason of insanity, then I have to prove to you that he didn't know right from

wrong. Would you make me do that before you'd even consider it?

MR. HAWKINS: Yes.

[36] [875] MS. DaPONTE: Okay. And, Mr. Hawkins, let me ask you: How do you feel about the insanity defense? Could you consider as a viable defense whether someone was suffering from a mental disease that made them unable to know right from wrong?

MR. HAWKINS: Yes.

MS. DaPONTE: Okay.

Ms. Goff, you have a hard time with the insanity defense?

MS. GOFF: I don't know if I really believe it.

MS. DaPONTE: Okay. Let me ask: Do you know anyone or have you heard of anyone with Alzheimer's?

MS. GOFF: Yes, I know somebody.

MS. DaPONTE: Okay. Do you know that person to do things that they don't even know that they're doing?

MS. GOFF: Yes.

MS. DaPONTE: Okay. If that person were to commit a crime, is there any way that you would believe that that person did not know that crime was wrong?

MS. GOFF: I guess so.

[37] [876] MS. DaPONTE: All right, do you think that you could consider the insanity defense in this case?

MS. GOFF: Yes.

MS. DaPONTE: Okay. I will assume, from everyone's answer to Mr. Olinde's questions, that everyone else feels the same way, they could consider whether someone actually was – No, two things: Whether somebody was suffering from a mental disease or defect and the second thing, whether that mental disease or defect rendered them incapable of distinguishing right from wrong. Is there anyone who just could not consider that as a viable defense?

Mr. Breaux, can you consider that as a defense?

MR. BREAUX: I can.

MS. DaPONTE: Okay. Does anyone in their family, and I'll start with Mr. Hawkins and Ms. Rizzo have family members or friends who are police officers, security guards, any involvement in law enforcement?

MR. HAWKINS: I have a lot of friends that are police officers.

MS. DaPONTE: And where are those friends police officers, in what –

[38] [877] MR. HAWKINS: Jefferson Parish.

MS. DaPONTE: Jefferson Parish, all right.

MR. HAWKINS: Third District.

MS. DaPONTE: Third District, all right. Your involvement with those people, would that, first of all, would that make you more likely to – There's going to be police officer testimony in this case. Do you think that it is

possible for a police officer to get on the witness stand and not tell the truth?

MR. HAWKINS: Yes.

MS. DaPONTE: Okay. Would you – So, you would not automatically believe a police officer over, say, my client?

MR. HAWKINS: No.

MS. DaPONTE: Okay.

Ms. Rizzo, no friends or family?

MS. RIZZO: Not really close, just some friends.

MS. DaPONTE: All right. And how do you feel about the possibility that a police officer might not be telling you the truth on the witness stand?

MS. RIZZO: [39] [878] They're human.

MS. DaPONTE: Okay. And is there any possibility that you might believe a lay witness over a police officer if their testimony was conflicting?

MS. RIZZO: Yeah.

MS. DaPONTE: Okay. Back row, Mr. Saulino, friends, family, police officer?

MR. SAULINO: Family in Ohio.

MS. DaPONTE: Okay. And they're police officers?

MR. SAULINO: Chief of police.

MS. DaPONTE: Chief of police in Ohio? What relative is that?

MR. SAULINO: My cousins.

MS. DaPONTE: How do you feel about the question that I just asked Ms. Rizzo and Mr. Hawkins?

MR. SAULINO: They're human. They lie –

MS. DaPONTE: So, you believe they can –

MR. SAULINO: Sometimes, they lie.

MS. DaPONTE: Okay. On the witness stand, even?

[40] [879] MR. SAULINO: Yeah.

MS. DaPONTE: Okay. Where in Ohio is your cousin police chief?

MR. SAULINO: One's in Liberty Township, and my uncle's in Youngstown, Ohio.

MS. DaPONTE: Anybody else, back row, friends or family, police officers?

Okay. And I'll ask the back row, Ms. Goff, do you believe a police officer could lie on the witness stand?

MS. GOFF: I guess.

MS. DaPONTE: Ms. DuBois?

MS. DuBOIS: Yes.

MS. DaPONTE: I'm going to say this right, Saracione?

MS. SARACIONE: Yes.

MS. DaPONTE: Sounds like Sierra Leone.

MS. SARACIONE: Right.

MS. DaPONTE: Ms. Scott, do you believe a police officer could lie on the witness stand?

MS. SCOTT: Yes.

[41] [880] MS. DaPONTE: And, Mr. Breaux?

MR. BREAUX: Yes.

MS. DaPONTE: All right.

Does anybody have any family in the military, or has anyone served in the military, themselves? Mr. Hawkins?

MR. HAWKINS: Yes, I served.

MS. DaPONTE: You served in what branch?

MR. HAWKINS: The Army.

MS. DaPONTE: How long?

MR. HAWKINS: Two years.

MS. DaPONTE: Okay. And how long ago was that?

MR. HAWKINS: I went in in '66 and came out in '68.

MS. DaPONTE: Okay.

Ms. Rizzo?

MS. RIZZO: My brother was in the Army.

MS. DaPONTE: Back row?

MS. SARACIONE: My brother was in the Marines, and my husband was in the Army, the end of World War II and the Korean War.

[42] [881] MS. DaPONTE: Ms. Goff?

MS. GOFF: My brother was in the Army in the '60s and my husband's with the National Guards for 8 years.

MS. DaPONTE: Okay.

Mr. Saulino?

MR. SAULINO: '70 to '74, Marine Corps.

MS. DaPONTE: You were?

MS. SAULINO: Yes.

MS. DaPONTE: Ms. Scott?

MS. SCOTT: I was in the Army from '71 to '73 and a brother that was in the Army, a brother-in-law –

MS. DaPONTE: Lots of military relatives, okay, and, Mr. Breaux?

Does everybody feel like what I said yesterday about the job of a juror, to be completely intellectual and not at all emotional, is something that you all could do? Everybody think you could do that? Okay.

And do you think, Ms. DuBois, if you heard some very sensationalistic and irrelevant evidence, do you think that you'd be able to screen that out, [43] [882] recognize it for what it is and throw it away, and I'll give you that example that I gave yesterday: If David Duke were on trial here for embezzlement and the prosecutors trotted out a bunch of

pictures of him in his Ku Klux Klan uniform and had nothing – Could you recognize that that had nothing to do with the charge, and could you throw that out and not consider it?

MS. DuBOIS: Yes.

MS. DaPONTE: And putting aside any feelings, personal feelings you might have about him, could you decide the case based on the facts that were relevant?

MS. DuBOIS: Yes.

MS. DaPONTE: Okay. Could everybody else do the same thing? Everybody recognize that irrelevant, sensational evidence and throw it out?

Mr. Breaux, do you feel like a defendant should be required to testify on his behalf?

MR. BREAUX: Yes.

MS. DaPONTE: You think he should be required to take the witness stand?

MR. BREAUX: Right.

[44] [883] MS. DaPONTE: And if Mr. Snyder elects not to take the witness stand, would you hold that against him?

MR. BREAUX: I don't know. I've got to look at the evidence.

MS. DaPONTE: And I'm going to try to ask you to pretend you've already listened to the evidence and Mr. Snyder didn't take the witness stand, and the State may not have convinced you a hundred percent, maybe you've got a close call and you're in the jury room deciding, and

you think, You know, I have some questions about the State's case. I sure wish Mr. Snyder had taken the witness stand, and I sure would like to hear what he has to say.

MR. OLINDE: I just have one objection and that's to the hundred percent comment. It's reasonable doubt.

MS. DaPONTE: I agree with that, Mr. Olinde, and I worded that badly.

If you were thinking about whether the State had proved its case to you beyond a reasonable doubt and you had some questions about the State's case and you said, I'm just not sure, I really wish I'd heard from Mr. Snyder, maybe he could have answered those questions for me. Do you think that might – The fact that he [45] [884] didn't take the witness stand, do you think that might make you vote with the State on a close case?

MR. BREAUX: Yes.

MS. DaPONTE: You think you would, all right. I appreciate that, Mr. Breaux. And, Mr. Breaux, let me just push you a little bit farther.

The Judge is going to tell you, you can't hold it against him. You can't. You can only consider the evidence that the State presents to you. Do you still think that on a close case, even if the Judge instructs you you can't hold that against him, do you still think that somewhere you might hold it against him because you didn't hear from him?

MR. BREAUX: I would think so.

MS. DaPONTE: I appreciate that, Mr. Breaux.

Ms. Scott, how do you feel? Can a defendant – Do you think that Mr. Snyder should get up and tell you what happened?

MS. SCOTT: It's his right.

MS. DaPONTE: Okay. And, Mr. Saulino, do you think that he should have to tell you what happened?

MR. SAULINO: It's his right. It's the law.

[46] [885] MS. DaPONTE: Okay. And you can hold – You can give him that right?

MR. SAULINO: That is his right.

MS. DaPONTE: Okay. Would you hold it against him if he elected to stand on that right?

MR. SAULINO: No.

MS. DaPONTE: Okay.

Ms. Saracione?

MS. SARACIONE: No, I wouldn't hold it against him.

MS. DaPONTE: You wouldn't hold it against him. Do you think that he should testify?

MS. SARACIONE: Well, I'd have to hear the evidence, but if his lawyers advised him not to, there must be a reason why they don't want him to, and I wouldn't hold it against him.

MS. DaPONTE: You wouldn't hold it against him. Ms. DuBois?

MS. DuBOIS: I wouldn't hold it against him.

MS. DaPONTE: You wouldn't hold it against him? All right.

Ms. Goff?

MS. GOFF: [47] [886] I don't guess.

MS. DaPONTE: You don't guess? Do you think that you could put – Do you think that you could put– Do you think that he should tell you what happened?

MS. GOFF: Yes, I do.

MS. DaPONTE: Can you envision any set of circumstances in which you would not take the witness stand?

MS. GOFF: Oh, yeah.

MS. DaPONTE: You could consider that you might not, yourself? Okay. So, you could allow Mr. Snyder to take that position as well?

MS. GOFF: (Nods head affirmatively.)

MS. DaPONTE: All right. Mr. Hawkins, how about you?

MR. HAWKINS: I couldn't hold it against him.

MS. DaPONTE: You wouldn't hold it against him?

MR. HAWKINS: No.

MS. DaPONTE: Okay.

And, Ms. Rizzo?

MS. RIZZO: No, I wouldn't hold it against him.

[48] [887] MS. DaPONTE: Ms. Saracione, you just now said something that I wanted to expand on. You said – Or, I'm sorry, was it Ms. DuBois? No, it was Ms. Saracione. You said if his lawyer advised him not to take the witness stand, there must be a reason.

MS. SARACIONE: Right.

MS. DaPONTE: Okay. Let me ask you about that. How do you feel about the fact that lawyers are going to be making a lot of the – actually, all of the legal decisions in this case? Can you understand that those decisions are our decisions?

MS. SARACIONE: Right.

MS. DaPONTE: And that Mr. Snyder – If you hold those decisions, if you don't like them, you can hold them against us but not against him. Could you do that?

MS. SARACIONE: Right.

MS. DaPONTE: Could every – Does everybody feel that way? Mr. Breaux, you feel that way?

MR. BREAUX: Right.

MS. DaPONTE: Everybody else feel that way, too?

Ms. Rizzo? Mr. Hawkins?

[49] [888] And I guess this is the last thing I have to say: We talked about the crime of manslaughter and whether every murder is or every homicide, I'm sorry, whether every homicide is actually a murder. I agree with everything Mr. Olinde said because he said everything I

said yesterday about manslaughter being committed in the heat of passion, which is caused by a serious provocation, something that would deprive the average person of his self-control and cool reflection.

What I just would like to ask all of you is whether you could consider that a murder might be mitigated to manslaughter, given the right circumstances. I'll start with you, Mr. Breaux. Do you think that you could consider mitigating circumstances, and I'm not talking about excusing the crime. I'm not talking about excusing the crime. You go to jail for manslaughter or you can for 40 – for up to 40 years. The sentencing range is from zero to 40 years, and it's up to the Judge.

Mr. Breaux, given circumstances such as I described yesterday – You remember those examples we talked about yesterday? Do you think that there's ever a time when a homicide, which would actually be a murder because it fits into the element, do you think that there would be a circumstance which you could envision where you could see that there was heat of [50] [889] blood, that it was caused by what you consider a serious provocation that would cause the average person to lose it?

You could consider that?

MR. BREAUX: Yes,

MS. DaPONTE: All right. How about you, ma'am?

MS. SCOTT: I can.

MS. DaPONTE: Sir?

MR. SAULINO: It would have to be based on the evidence.

MS. DaPONTE: Sure.

MR. SAULINO: Yes.

MS. DaPONTE: But you could consider a set of circumstances where if the evidence showed you there was all those elements present, you could consider that mitigation?

MR. SAULINO: Yes.

MS. DaPONTE: Ma'am?

MS. GOFF: Yes.

MS. DaPONTE: And can I ask you all when you're considering this case, if you are selected as jurors. if you would consider this as [51] [890] you would consider the most very serious decisions in your own life, whether to get married, whether to buy a house, whether to have children, whether to have second opinion or have surgery and maybe even then some, because as we live our lives, we realize that sometimes the decisions that we make for ourselves, the bad decisions that we make for ourselves, sometimes we can undo those decisions.

I had a friend once who, after a long, long, long separation, finally got divorced, and she said, "If I had known it was this easy, I would have done it sooner and I would have done it more often." And so, a lot of times, we can get those bad decisions, we can get rid of them. But this is a circumstance that you can never change; so, I'd ask you to use an even higher standard knowing that once this

decision is made, that decision is your decision and it's final.

Can you take that very serious responsibility and promise me you'll give it that very serious standard of proof? Mr. Hawkins?

MR. HAWKINS: Yes.

MS. DaPONTE: Mr. Moore?

MR. MOORE: Yes.

MS. DaPONTE: Okay. You can do that, Ms. Rizzo?

[52] [891] MS. RIZZO: Yes.

MS. DaPONTE: Mr. Breaux?

MR. BREAUX: Yes.

MS. DaPONTE: Ms. Scott?

MS. SCOTT: Yes.

MS. DaPONTE: Okay. Thank you.

Mr. Vasquez is going to talk to you for a minute about the penalty phase. Thank you.

MR. VASQUEZ: Good morning, Ladies and Gentlemen. It may be more than a minute but it won't be too much more than that.

I'm going to ask you all to go forward, again. Let's assume that we're in the penalty phase of this case.

Ms. Saracione, if I present – If I'm able to, and I'm not saying I will, but if I'm able to present evidence to you that Mr. Snyder was a hard-working man, that he cared about

kids, that he led a pretty clean life, is that mitigating circumstance – Are those mitigating circumstances that you could consider?

MR. OLINDE: Your Honor, I'm sorry, but with all due respect, the objection is without hearing any of the evidence in evaluating [53] [892] the testimony and asking them. These facts, can you consider these facts without hearing the testimony under cross-examination and looking at the witnesses, I think he can ask whether he can consider – they can consider mitigating circumstances, but throwing in the facts and whether they can consider those without actually being here to consider them is objectionable, specific facts.

MR. VASQUEZ: Judge, I'm entitled to ask the jurors if they can consider mitigating circumstances. I can give specific examples of certain mitigating circumstances and ask the jurors whether they can consider it or not. That's clear case laws, I mean, historic. I'm entitled to ask that.

THE COURT: Objection overruled.

MR. VASQUEZ: Thank you.

Ma'am, did you understand the question?

MS. SARACIONE: Can you repeat it?

MR. VASQUEZ: Sure. I'll try to clear it up a little bit more.

Let's assume, because the law allows me to present mitigating circumstances, let's assume, you found Allen Snyder guilty of first degree murder. We're now [54] [893] in the sentencing phase or the penalty phase where the

two things that you are to consider are life imprisonment or the death penalty. If I present evidence to you that Allen Snyder loved his kids or that he was a hard-working man or that he was a good neighbor, are those factors that you could consider – Forget about the guilt because we're beyond that at this stage – Are those factors that you could consider in determining life versus death?

MS. SARACIONE: Well, I'd have to hear all the evidence.

MR. VASQUEZ: Yes, ma'am.

MS. SARACIONE: And I guess I could consider it –

MR. VASQUEZ: Okay.

MS. SARACIONE: – whether he gets life or death.

MR. VASQUEZ: You could consider those factors?

MS. SARACIONE: Right.

MR. VASQUEZ: You could keep an open mind?

MS. SARACIONE: Right.

MR. VASQUEZ: And that's really all we want, both sides, believe it or not, that's what we [55] [894] want, people that can keep open minds. Okay.

Mr. Saulino, same question to you, sir.

MR. SAULINO: I'd have to hear all the evidence.

MR. VASQUEZ: And you could consider things like that when it comes to deciding life versus death?

MR. SAULINO: Yeah.

MR. VASQUEZ: Okay, Ms. DuBois, same question to you.

MS. DuBOIS: I could consider it.

MR. VASQUEZ: Is it something you can seriously consider, or is that –

MS. DuBOIS: After hearing all the facts, I could consider it.

MR. VASQUEZ: Okay. Fair enough.

Mr. Breaux, I want to ask you a question. I hate to – I know we've been picking on you and I don't mean to, but do you believe that perhaps life imprisonment is a waste of taxpayers' money?

MR. BREAUX: Not really if they deserve to be there.

MR. VASQUEZ: [56] [895] Okay. So if I present evidence to you of certain mitigating circumstances that would mitigate a life sentence versus a death penalty, could you consider all of that?

MR. BREAUX: Yes, sir.

MR. VASQUEZ: Ms. Rizzo, same question: Could you consider –

MS. RIZZO: Wait. Tell me –

MR. VASQUEZ: Well, which one? Yeah, I asked a bunch of them. Questions about mitigating circumstances, can you consider those types of –

MS. RIZZO: Yes, I can.

MR. VASQUEZ: Ms. Scott, can you consider mitigating circumstances, you know, a person's upbringing or the kind of life that he led prior to a certain incident in his life, can you consider that in deciding life versus death?

MS. SCOTT: Right.

MR. VASQUEZ: Mr. Moore, do you understand that you don't have to impose the death penalty, that you're never required to impose it?

MR. MOORE: Yes. I understand that.

[57] [896] MR. VASQUEZ: The legal question then, and that's what we've been trying to ask is: Could you at least consider the imposition of the death penalty, not necessarily that you have to vote for it, just like you don't have to vote for life, but could you consider an imposition of it?

MR. MOORE: No, I could not.

MR. VASQUEZ: Under no circumstances whatsoever?

MR. MOORE: No.

MR. VASQUEZ: Judge, if I could have just a brief moment.

Thank you, Ladies and Gentlemen. Thank you.

MR. OLINDE: Judge, I've got two witnesses, two jurors I want to traverse.

Mr. Saulino, we're not allowed to get into facts but I'm going to tell you Allen Snyder was in the Marine Corps at one point in his life, and the fact that you were also in the Marine Corps, is there going to be some kind of bond of brotherhood there that will make you be unfair to us?

MR. SAULINO: No, or unfair to him.

MR. OLINDE: That's no. All right. All right, so [58] [897] you can disregard that and can call the case on the facts?

MR. OLINDE: Mr. Breaux, only a couple of brief questions for you and that is, you said, when I asked the panel and said, "Could everybody give Allen Snyder his Fifth Amendment Rights regarding the right to remain silent", okay? Can you do that if the Judge tells you – Even though you may feel, Hey, I want to hear both sides of the story. I may want to hear what everybody has to say about this, but in this system, the way the constitution is, you've got to make your mind up on the evidence you hear from the witness stand, without thinking about what he might or might not say, okay? And you've got to hold us to our burden of proof beyond a reasonable doubt. Do you think you can, like everybody else here, do that?

MR. BREAUX: Yes.

MR. OLINDE: You can?

MR. BREAUX: Yes.

MR. OLINDE: So, if he decides to remain silent, can you make your mind up just on what you hear from

the witness stand, the evidence we present and still hold us to our burden of proof and reasonable doubt?

MR. BREAUX: [59] [898] Yes.

MR. OLINDE: You can do that?

MR. BREAUX: Yes.

MR. OLINDE: I have no questions.

(The following is taken outside the hearing of the prospective jurors.)

THE COURT: Challenges for cause.

MR. OLINDE: Yes, Your Honor.

MR. OLINDE: I think Ms. DaPonte rehabilitated Mr. Hawkins, but I do challenge Mr. Moore for no death.

THE COURT: All right. I'm going to excuse Mr. Moore.

MR. OLINDE: Ms. Alvarez said she could not impose the death penalty.

THE COURT: I'm going to excuse Ms. Alvarez.

MR. OLINDE: Mr. Shah said he could not impose the death penalty.

THE COURT: Excuse Mr. Shah.

MR. VASQUEZ: That's all?

MR. OLINDE: I have no other challenges.

[60] [899] MS. DaPONTE: Judge, for cause, Karen Primeaux.

THE COURT: I'm going to excuse Ms. Primeaux.

MS. DaPONTE: For cause, Jessika Prem.

MR. OLINDE: No objections.

THE COURT: Excuse Ms. Prem.

MS. DaPONTE: And, Judge, I think that Mr. Breaux, although Mr. Olinde rehabilitated him to the extent that he said he could hold the State to their burden, on the gabber came off as saying that he needed to hear from the defendant.

THE COURT: I'll allow you to traverse him, but I'm not going to excuse him for cause at this point.

MR. WILLIAMS: I think he made it pretty clear.

MR. OLINDE: I think he did, too. They can use a peremptory.

MS. DaPONTE: Well, that's why the Judge is giving us a chance to traverse him.

THE COURT: Yes. Let's bring him to the bench. Mr. Breaux, would you come to the bench, sir?

(Mr. Breaux joins the Judge and counsel at [61] [900] the bench out of the hearing of the prospective jurors.)

THE COURT: Mr. Breaux, I wanted to ask you about the Fifth Amendment Right to remain silent, whether the fact that if he decides to exercise that right, whether you hold that against him?

MR. BREAUX: Not really, no. Just –

THE COURT: You realize that that's a right that he has.

MR. BREAUX: I know.

THE COURT: That shouldn't –

MR. BREAUX: Yeah.

THE COURT: – have any bearing in your decision.

MR. BREAUX: No, it ain't going to hurt my decision, no.

THE COURT: Okay. All right. Thank you, sir.

(Mr. Breaux rejoins prospective jurors remaining out of the hearing of the prospective jurors.)

MS. DaPONTE: Challenge denied? Challenge denied?

THE COURT: Challenge denied.

MS. DaPONTE: [62] [901] Note my objection.

THE COURT: All right. Mr. Hawkins?

MR. OLINDE: State excuses Mr. Hawkins.

MS. DaPONTE: Note for the record that Mr. Hawkins is a black juror.

MR. OLINDE: Are you making a challenge that you want me to make –

MR. VASQUEZ: She didn't object.

MR. OLINDE: Okay.

THE COURT: All right. Ms. Rizzo?

MR. OLINDE: We'll keep her.

MS. DaPONTE: She's acceptable.

THE COURT: All right. Ms. Goff?

MR. OLINDE: Excused.

THE COURT: Ms. DuBois?

MR. OLINDE: She's acceptable.

MS. DaPONTE: Acceptable.

THE COURT: Ms. Saracione?

MR. OLINDE: [63] [902] She's acceptable.

MS. DaPONTE: Yes.

THE COURT: Mr. Saulino?

MR. OLINDE: Accepted.

MS. DaPONTE: Excused.

THE COURT: Ms. Scott?

MR. OLINDE: Excused.

MS. DaPONTE: Judge, at this time, I would note for the record Ms. Scott is an African American juror, and that's three, now. I'd like a – I think that there has been a pattern, and I would ask the State to provide a racially neutral reason.

MR. WILLIAMS: For Ms. Scott, the reason is is I observed she was very weak on her ability to consider the imposition of the death penalty. Her words, exactly – I wrote it down, that she thinks she could, and that's the reason for our challenge.

MR. OLINDE: And she was very – My notes indicate she was very positive on when I said about a life sentence, she was very positive on her reason – Her agreement that she could do that. It's for that reason –

MR. VASQUEZ: [64] [903] You know, the law is clear. If I were doing the same thing, they'd be up here holding me to the same standard. This lady indicated that she could consider both. She was honest about it. She also said she could consider the death penalty. She was not hiding anything. She knows how to get off of this jury if she wants to, either way, and she could have done that. She's kept an open mind, and that's what we're looking for.

MR. OLINDE: Your Honor, –

MR. VASQUEZ: That is not a sufficient reason.

MR. OLINDE: This is a peremptory challenge. I'm not asking to excuse her –

MR. VASQUEZ: This is a Batson challenge.

MR. OLINDE: No, this is a peremptory challenge by us, and we can do it if we find anything that makes us believe that she's weak on death. We can excuse her for that reason.

MR. WILLIAMS: The Supreme Court has so held in the case that I – Feltus Taylor. There's probably 50 reasons, and one of the reasons that we gave has been declared race neutral, and it is. I mean, it is; she's weak.

THE COURT: All right. I'm going to go ahead and [65] [904] allow the challenge.

MR. VASQUEZ: Please note our objection.

MR. OLINDE: And Mr. Hawkins, my reason –

MR. WILLIAMS: We don't – You don't have to.

THE COURT: So, we have three, right?

MR. OLINDE: No, Mr. Breaux –

MS. DaPONTE: Mr. Breaux.

MR. WILLIAMS: – is accepted.

So we've got six Defense –

MS. DaPONTE: Six Defense and State.

MR. WILLIAMS: –six State. And eight jurors.

(The following is taken within the hearing of the prospective jurors.)

THE COURT: All right. The Court would like to thank and excuse everyone except for Ms. Rizzo, Ms. DuBois, and Ms. Saracione. Thank you very much.

All right. Will the bailiff please escort the jurors to the jury room?

Let's swear them in.

(Whereupon the chosen jurors are sworn to hear the case.)

THE COURT: All right. Will the bailiff please [66] [905] escort the jurors to the jury room.)

(Jurors exit courtroom.)

THE COURT: Please draw 13 more names at random.

THE LAW CLERK: Number 2, Wayne M. Africh.

Number 498, Janice B. Savoie.

Number 159, Iris C. Dyess.

Number 572, Loretta S. Walker.

Number 48, Lawrence J. Blum.

Number 514, James A. Simoneaux.

Number 515, Myrtle C. Simoneaux.

Number 591, Donald M. Wolfe.

Number 254, Darlene H. Hernandez.

Number 517, Eugene Sinceno, Jr.

Number 97, Edmond J. Cantrelle.

Number 534, Denise H. Stine.

Number 522, Wayne E. Slaney.

THE COURT: All right. I will begin by asking each of you to give us your full name, address, occupation, marital status and number and ages of your children, if any. If you are married, please tell us your spouse's occupation, if your spouse is employed outside the home. Please speak loudly and clearly.

MR. AFRICH: Wayne M. Africh, 4900 Picone Street in Metairie. I'm married. I have 3 children, age 17, 14, and 10. I'm employed by Laitram Corporation. My wife works at East Jefferson General Hospital.

MS. DaPONTE: [67] [906] I'm sorry, employed where, sir?

MR. APRICH: Laitram Corporation.

MS. DaPONTE: Thank you.

MS. SAVOIE: Janice Savoie, 2813 Bayou Teche, Marrero. I'm employed at West Jefferson Medical Center as a business office manager. My husband is employed as a carpet installer, and I have a 21-year-old daughter.

MS. DYESS: Iris Dyess. I work for a steamship company, Concord Shipping. I'm divorced. I have 2 children, 18 and 23.

MS. WALKER: My name is Loretta Walker. I'm a salesperson. My husband is retired. I have 3 children, 29, 27 and 20.

MR. BLUM: My name is Lawrence Blum. I'm married. My wife is a secretary. I'm parts department manager for Pep Boys Auto Parts. I have 2 children, 6 and 8.

MR. SIMONEAUX: James A. Simoneaux, 604 Bertucci Street, Marrero, three kids, can't remember their age, married, retired.

MR. WILLIAMS: Where did you retire from, sir?

MR. SIMONEAUX: Business.

MS. SIMONEAUX: [69] [907] Myrtle Simoneaux. I live at 600 St. Julien Street in Kenner. I work for the Jefferson Parish Sheriff's Office as a secretary in the tax department. I'm married and I have one child. My husband works at Petro Marine, and he's an engineer.

MR. WOLFE: My name is Donald M. Wolfe. I live at 1347 Segura Avenue in Metairie. I am married. My

wife works for the Jefferson Parish School Board. I have 3 children, aged 34, 29 and 19, and I'm retired from pharmaceutical sales.

MS. HERNANDEZ: My name is Darlene Hernandez. I'm a physical education teacher at a Catholic school in Kenner. I'm married. I live at 908 Richmond. I have two children. They are 19 and 17, and my husband works for South Central Bell.

MR. SINCENO: My name is Eugene Sinceno, Jr. I work at Pellerin Milnor Corporation, and I live 1609 Clearview Parkway, divorced. I have 1 son that's 9 years old.

MR. CANTRELLE: My name is Edmond Cantrelle. I live at 809 Cynthia, Metairie, Louisiana. I'm married. My wife's a legal secretary. I have one daughter. She's 11.

MS. STINE: My name is Denise Stine. My husband is in sales in the car, automotive [69] [908] business industry. I live at 1328 Choctaw Avenue, Metairie. I have 2 children, 17 and 18, and I'm a landscaper.

MR. SLANEY: My name is Wayne Earl Slaney. I live at 1521 Vegas Drive in Metairie. I'm employed at Entergy as a senior line mechanic, single, with no children.

THE COURT: Okay. Please answer the questions of the attorneys.

MR. WILLIAMS: Thank you, Your Honor.

May it please the Court, good morning, Ladies and Gentlemen. Were all of y'all able to hear everything that all of us have said throughout yesterday and today?

Okay. Are there any of you all seated here who have any questions at all about the law that's applicable in this case? I'd be happy to answer anything that you need to know.

Mr. Africh, if you were selected as a juror, and once again, when I ask you these questions, I want you to keep in mind everything that's been said so far. If you were selected as a juror in this case, sir, and the case got to the penalty phase, could you consider the imposition of the death penalty?

MR. AFRICH: Yes, I could.

MR. WILLIAMS: All right.

[70] [909] Ms. Savoie, if you were selected as a juror in this case and the case proceeded in the penalty phase, could you consider the imposition of the death penalty?

MS. SAVOIE: Yes.

MR. WILLIAMS: Ms. Dyess, could you consider the imposition of the death penalty if you were selected as a juror in this case?

MS. DYESS: Yes, I could.

MR. WILLIAMS: Ms. Walker, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MS. WALKER: No, I could not.

MR. WILLIAMS: Ms. Walker, is that based upon a long-standing religious, moral, or personal belief that you have?

MS. WALKER: Religious, yes.

MR. WILLIAMS: And can you envision any facts, terrible, terrible things that you would hear that would cause you to change your mind?

MS. WALKER: It's possible, yeah.

MR. WILLIAMS: Okay. Let me ask you what sort of facts could cause you to change your mind?

[71] [910] MS. WALKER: All right.

MR. WILLIAMS: Keep in mind that this man right here (indicating), is the one we're talking – We're not talking about Adolph Hitler. We're not talking about historical figures who have done horrible things. I want to know if there's anything that you can think of that this man here did, –

MS. DaPONTE: Judge, objection.

MR. WILLIAMS: – that could cause you to want to put him to death?

MS. DaPONTE: Judge, Objection. That is improper. It is under any circumstances – If she could consider the death penalty under any circumstances, she is a suitable juror. Mr. Williams knows that.

MR. WILLIAMS: No, Mr. Williams doesn't know that, Ms. DaPonte, and it's – We're talking about this man right here, not anybody else.

MS. DaPONTE: Objection, Your Honor. That is not fair for voir dire.

MR. WILLIAMS: What's the chosen case?

MS. DaPONTE: Mr. Williams –

THE COURT: [72] [911] Well, –

MR. WILLIAMS: It's wrong. Obviously –

THE COURT: Counsel, please approach.

(The following is taken outside the hearing of the prospective jurors.)

THE COURT: All right. First of all, any remarks need to made to the bench, not to each other, okay? We might as well start with that. Okay? From now on, no remarks.

MR. WILLIAMS: She started it. She called my name.

THE COURT: But she addressed me. She said, "Your Honor."

MS. DaPONTE: Just like Mr. Olinde said, we are talking about any set of circumstances in which you could give a life sentence, just like the big, old hypothetical about the poor guy whose wife and kids were being shot as he listened on the phone. We're talking about any case in which they could envision life, and it goes the same way for the State. Any case in which they can envision giving the death penalty makes them a suitable juror, and for Mr. Williams to point to Allen Snyder and say, "Could you give the death penalty to this guy?" is not proper. That's not

fair. That's not the right question. It is: Can she consider it for any circumstances.

[73] [912] MR. WILLIAMS: That's absolutely incorrect, and I'll stand corrected if you show me a case.

MR. VASQUEZ: I'll be glad to.

MR. WILLIAMS: The law is is that they can conduct them – Just like he said: If you find that he killed 20 people before, could you – They can't say Adolph Hitler – The only person on trial here is that man over there. They can't say David Duke. They can't say anybody bad. They're talking about – The proper question is: Could you envision a set of circumstances that that man could have done? And then they can get up and ask: Let's suppose the evidence showed that he killed five people before, could you consider the death penalty now? That's proper. But you can't use these – Because, obviously, there's not a person in the world that wouldn't think that Adolph Hitler deserved the death penalty. I mean – And it's improper, and if you've got a case, show me.

MR. VASQUEZ: I don't have to –

MS. DaPONTE: Nobody's suggesting that Mr. Williams has to use vicious historical figures.

THE COURT: Right.

MS. DaPONTE: [74] [913] The question is: Can you envision any circumstance in which you could give the death penalty?

MR. WILLIAMS: For this guy here.

MR. VASQUEZ: Yes.

MR. WILLIAMS: Well then, show me where I'm wrong.

MR. VASQUEZ: No, that's not –

MR. WILLIAMS: Well, then, show me where I'm wrong.

MR. VASQUEZ: Well, I'm going to need time to research. I have it.

MR. WILLIAMS: Because you're making it up.

MR. VASQUEZ: I'm not making it up, Mr. Williams. Don't accuse me of that.

Judge, the standard is whether they can consider it, and we are allowed to ask hypothets in order to determine, because sometimes they say that –

MR. WILLIAMS: I'm not arguing with that.

MR. VASQUEZ: And I've got – If they get up and they say: If the evidence shows that this man, here, in his past killed children, raped children, I can't object to that, but I certainly can object to circumstances not including him. They can [75] [914] ask the most horrible hypothet in the world about him, but they can't be talking about any set of circumstances because it's not relevant to his case.

THE COURT: Well, I have to see a case.

MR. VASQUEZ: Okay. Well, I'm going to need a few minutes. I mean, I have the stuff, but, you know, I'm going to need some time to come up with it. I mean, this – I've never had this sort of a problem before, so it is well-known. I mean, it's used all the time.

MR. WILLIAMS: Well, if it's well-known, then give me the case.

MR. VASQUEZ: Okay. Well, I'll pull it.

MR. WILLIAMS: Good.

MR. VASQUEZ: Okay.

THE COURT: All right. Right now might be a time we can take a break now, I guess.

MR. VASQUEZ: Okay.

MR. WILLIAMS: And they're going to have a – I mean, it's all going to be clear, you know, when they have the chance to talk it on their side, too. I just –

THE COURT: [76] [915] All right. Do y'all want to take a ten-minute recess?

MR. VASQUEZ: Well, let's see how she answers the question. How's that? That way, we don't have to take a break.

THE COURT: All right. We're going to go ahead and take a ten-minute recess.

MR. WILLIAMS: I don't think we need to do that. I don't think we need to do that.

MR. VASQUEZ: If he can continue asking his questions, I'll keep looking.

THE COURT: All right.

MR. OLINDE: What if she answers the question in a way that we can move on?

MR. WILLIAMS: I'll keep going.

(The following is taken within the hearing of the prospective jurors.)

MR. WILLIAMS: Okay, Ms. Walker, back to you. I'm not picking on you, just want to find out how you feel. Now, you told me that you didn't – Because of religious belief, you couldn't impose the death penalty?

MS. WALKER: Right.

MR. WILLIAMS: Now, my next question was: Would that [77] [916] be – You can't imagine a situation where you would sentence that man to death because of your long-standing religious belief?

MS. WALKER: Because I don't know the circumstance, I can't say.

MR. WILLIAMS: Right. That's – And I'll be happy to explain that to you because I think there's just a misunderstanding here on my part. If you had to vote right now, Ms. Walker, you'd have to find him not guilty.

MS. WALKER: Right.

MR. WILLIAMS: Right now, if I said, "What's your vote in this case," you, along with everybody else, you'd have to say not guilty.

MS. WALKER: Right.

MR. WILLIAMS: All right. Now, you know – I mean, there's – You're hearing a lot of things and you may – Do you think you know now what this case is about, having – You sitting there and listened attentively?

MS. WALKER: No, not really.

MR. WILLIAMS: Okay. Because they said a lot of stuff. They talked about domestic abuse. They talked about manslaughter. They've [78] [917] talked about not guilty by reason of insanity. They've talked about not guilty. They've talked about all kinds of things, and it would just be natural, I'm assuming, for everybody here to think, Well, gee, I wonder what their defense is, but, you know, we're not going to tell you. You know, if you're selected as a juror, you'll find out. They have the right to explore how you feel about those things, okay, every right to do that, just as the State has the right to see, well, you know, could you consider the imposition of the death penalty, because obviously the State is seeking the death penalty in this case. And we don't want to have any jurors who couldn't do that. Just like the defense, they don't want to have any jurors who would automatically impose the death penalty.

We want people who could listen to the evidence and after having heard all of the evidence, make up your mind. That's, in the nutshell, what we want to do.

Now, when I asked you, Ms. Walker, these questions, once again, you recall what I said to the first group? You know, I don't know you. You know, you don't know that man, I'm assuming, over there. You don't know any – You know, the other lawyers, and we're putting you kind of on the hot seat here to ask you about things that – I mean, certainly – I – You know, it wouldn't hurt my feelings if you [79] [918] told me, You know, Mr. D.A., how on earth could you ask me about the death penalty? I don't know that man and I don't know a thing about this case, but that's the way this jury selection works in this kind of case. We have to make this assumption that you've already found him guilty, okay? That you've already found him

guilty and you found, as we allege, that he's charged with the killing of Howard Wilson, Jr., all right?

And the thing that makes this a first degree murder is that the State alleges that this killing occurred when he had an intent to kill more than one person. That's what makes it first degree and not second, okay? Are you with me so far on that? See, right now, he's innocent, innocent, innocent, because you haven't heard any evidence. However, if you're selected as a juror and you get to the point in the future, let's say, hopefully Thursday or Friday, where you've heard the evidence and you felt the State proved its case: He's guilty of killing Howard Wilson, Jr., and he had an intent to kill more than one person when he did that. Then we go to the penalty phase. Then you'll have a 12-hour break, by law. You'll come back into court and we start another trial. And that's when we put on evidence for you to decide what penalty you're going to give him. Are you with me on that?

[80] [919] MS. WALKER: Yes.

MR. WILLIAMS: Okay. Now, and that's, you know – Once again, right now he's innocent, you know? I'll yell that as loud as they will, because it's a fact. And do you understand why I ask you now in advance about your feelings, because as you told me initially, you said, "I couldn't. My religious belief keeps me from imposing the death penalty." You see, if there were a person – I'm not going to talk about you – Who felt a very deep religious conviction that they could not impose the death penalty on somebody, the State wouldn't want to have that person on the jury, and that's not to say that the person who felt like that is a bad person. But since you've heard that the State wants the death penalty in this case, why would we want

to put somebody on the jury who could never vote for the death penalty when it only takes one person?

If the 12 people that hear this case, 11 of them want the death penalty and one person doesn't, then it's life imprisonment, and that's the law. Okay, so do you understand where I'm coming from, and If I'm raising my voice, it's just I always raise my voice. I want everybody to hear everything that I'm saying. So, if these people get called up here, they will have heard us talking [81] [920] about this, okay? So, are you with me? Do you think you understand, you know, where I'm coming from now?

MS. WALKER: Yes.

MR. WILLIAMS: Good. So, I'll ask you again, ma'am: Could you consider the imposition of the death penalty?

MS. WALKER: No, I could not.

MR. WILLIAMS: Okay. And that's based upon a long-standing religious, moral, or personal belief; is that correct?

MS. WALKER: Right.

MR. WILLIAMS: And my next question is, because they're going to ask about this, so I'm kind of stealing their thunder so to speak.

MS. WALKER: Okay.

MR. WILLIAMS: Could you imagine that he could have done something – Let's say in his past he did some real bad things that would cause you to change your religious feeling about the death penalty?

MS. WALKER: In the past if you've done bad things?

MR. WILLIAMS: Right. So, –

[82] [921] MS. WALKER: Child molestation, killing a child, yes.

MR. WILLIAMS: Okay.

MS. WALKER: Yes.

MR. WILLIAMS: All right. So then, if your religious belief is suspended if you found out he did something bad –

MS. WALKER: An innocent child, yes.

MR. WILLIAMS: Okay. All right. That's just fine. Okay, Mr. Blum, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MR. BLUM: Yes.

MR. WILLIAMS: Mr. Simoneaux?

MR. SIMONEAUX: No.

MR. WILLIAMS: You could not, okay. Is that based upon a long-standing religious, moral or personal belief?

MR. SIMONEAUX: I'm a Christian man and –

MR. WILLIAMS: I beg your pardon?

MR. SIMONEAUX: [83] [922] I'm a Christian man, and at my age, I find life very precious; so, I don't think I could vote for death.

MR. WILLIAMS: Can you envision any set of circumstances, anything that you would learn about that man that could cause you to change your mind?

MR. SIMONEAUX: No.

MR. WILLIAMS: Ms. Simoneaux, any relation to Mr. Simoneaux?

MS. SIMONEAUX: No.

MR. WILLIAMS: Okay. Ms. Simoneaux, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MS. SIMONEAUX: Yes.

MR. WILLIAMS: Mr. Wolfe, if you were selected as a juror, sir, could you consider the imposition of the death penalty?

MR. WOLFE: Yes.

MR. WILLIAMS: Ms. Hernandez, if you were selected as a juror, could you consider the imposition of the death penalty?

MS. HERNANDEZ: Yes.

[84] [923] MR. WILLIAMS: Mr. Sinceno, is it?

MR. SINCENO: Yes.

MR. WILLIAMS: If you were selected as a juror in this case, sir, could you consider the imposition of the death penalty?

MR. SINCENO: No.

MR. WILLIAMS: Okay, sir. Is that based upon a long-standing religious, moral, or personal belief that you have?

MR. SINCENO: Well, I would say I'm not religious, but I'm a born-again Christian because I receive Jesus Christ as my Lord and Savior. I became a child of God, and I'm not religious and I will not see no man die but receive Jesus Christ or even if he wanted them to.

MR. WILLIAMS: Thank you. So, based upon what you told me, there's nothing you could hear about that man that would cause you to change your deep conviction, correct, sir?

MR. SINCENO: No.

MR. WILLIAMS: Thank you.

Mr. Cantrelle, if you were selected as a juror, sir, could you consider the imposition of the death penalty?

[85] [924] MR. CANTRELLE: Yes.

MR. WILLIAMS: Ms. Stine, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MS. STINE: Yes, I could.

MR. WILLIAMS: Mr. Slaney, if you were selected as a juror, could you consider the imposition of the death penalty?

MR. SLANEY: Yes.

MR. WILLIAMS: Now, those of you all – Let's see, Mr. Sinceno cannot consider the death penalty and Mr. Simoneaux cannot consider the death penalty. Those

of you all who answered that you could, are there any of you all who feel that you would automatically impose the death penalty without any consideration of possible reasons why you should consider life imprisonment?

Mr. Africh, you could consider both?

MR. AFRICH: I could.

MR. WILLIAMS: Ms. Savoie?

MS. SAVOIE: Yes.

MR. WILLIAMS: You could consider both?

[86] [925] MS. SAVOIE: Yes.

MR. WILLIAMS: Ms. Dyess, you could consider all the circumstances before you made your decision?

MS. DYESS: Oh, yes.

MR. WILLIAMS: Mr. Blum, could you consider all the evidence before you make your decision?

MR. BLUM: Yes.

MR. WILLIAMS: Mr. Slaney, could you consider all of the evidence before you make your decision?

MR. SLANEY: On a murder case, no, I couldn't.

MR. WILLIAMS: So, you're saying that if you find him guilty –

MR. SLANEY: If you can find him guilty, well, I don't see why you should do that. So, I'd say, no.

MR. WILLIAMS: Okay. Nothing that they could say about him could cause you to even consider life imprisonment?

MR. SLANEY: No.

MR. WILLIAMS: Okay. Ms. Stine, could you consider [87] [926] evidence of mitigation before deciding on a penalty in the case?

MS. STINE: Yes, I could.

MR. WILLIAMS: Okay. Mr. Cantrelle, could you consider evidence of mitigation? In other words, could you listen to evidence that they put why you should consider life imprisonment?

MR. CANTRELLE: No, sir.

MR. WILLIAMS: You're saying you would automatically impose the death penalty no matter what the evidence was?

MR. CANTRELLE: Yes, sir.

MR. WILLIAMS: You would not even consider anything?

MR. CANTRELLE: No, sir.

MR. WILLIAMS: Ms. Hernandez, how about you? Could you consider evidence of mitigation if you were selected as a juror?

MS. HERNANDEZ: No, not for murder.

MR. WILLIAMS: So, if you found him guilty of murder, without any – You would impose the death penalty?

MS. HERNANDEZ: Without a doubt.

[88] [927] MR. WILLIAMS: Mr. Wolfe, how about you, sir? Could you consider evidence of mitigation?

MR. WOLFE: Yes.

MR. WILLIAMS: Ms. Simoneaux, could you consider evidence of mitigation?

MS. SIMONEAUX: Yes.

MR. WILLIAMS: Okay. All right.

Now, Ladies and Gentlemen, regarding the defense of insanity, you've heard it talked about, and I'll be very brief. The law of Louisiana entitles any citizen who is charged with a crime to raise whatever defense they want to raise. As I said before, there are a number of defenses to crimes. There's an alibi defense that you weren't there when it happened. There's self-defense that you acted to protect yourself, there are several defenses. There's a defense, actually, that someone can say that they were so drunk, that somebody had made them drunk against their will, and they committed a crime, like, say, breaking into a car or something. Intoxication is a possible defense, and likewise, insanity is a defense available to any citizen who is charged with a crime.

Now, the important question here, and I made a note of what Mr. Olinde said, and [89] [928] I – And it really hits home. The thing that's important is: Could you listen, consider, and then reject or accept it? I think that pretty much is the thing that you should do with everything that's involved in a criminal case, because both sides want people who will listen to everything that's said and wait until everything has been said before you make up your mind.

Now, Mr. Africh, with that said, sir, do you understand that the defense of insanity is available to any person charged with any crime in the state in Louisiana?

MR. AFRICH: Yes, I do.

MR. WILLIAMS: All right. Do you understand that basically what insanity means is before you could consider that as a defense to a crime, it would have to be shown that a defendant had a mental disease or defect, whether that – whatever that might be, which caused them to be unable to distinguish between right and wrong. That is a defense in this case, as you've heard it.

Now, it's not – Actually, I misspoke. It is a defense that's being urged by them. You haven't heard anything yet. No – Actually, you may not hear anything about this because they've got a dual plea: They've got not guilty and not [90] [929] guilty by reason of insanity. They may choose not to put on a word about insanity since they also have a plea of not guilty. But since they've raised that defense, you know, you've heard us talking about it, do you feel that if you were selected as a juror in this case and they raise that defense, that you could listen to it, consider it, and then reject it or accept it?

MR. AFRICH: Yes, I could.

MR. WILLIAMS: Ms. Savoie, same question: Do you feel that if the defense in this case put on evidence of insanity that you could listen to it, consider it and then reject it or accept it?

MS. SAVOIE: Yes, I could.

MR. WILLIAMS: Ms. Dyess, same question to you.

MS. DYESS: Yes.

MR. WILLIAMS: Okay.

Let's see. Mr. Blum, same question: Do you feel that you could listen to the evidence, whatever it was through, say doctors or other witnesses and then you could consider it. Does that make sense to me or not make sense to me, and then reject it or accept it?

MR. BLUM: [91] [930] No, I couldn't.

MR. WILLIAMS: So, you would automatically reject the defense of insanity?

MR. BLUM: That's correct.

MR. WILLIAMS: Nothing could change your mind?

MR. BLUM: No.

MR. WILLIAMS: Okay. I'm not going to argue with you.

Ms. Simoneaux, how about you, ma'am?

If you were selected as a juror in this case and it came to pass that they decided to avail themselves of the defense of insanity, could you listen to the evidence, consider it, and then reject it or accept it?

MS. SIMONEAUX: Yes, I could.

MR. WILLIAMS: Mr. Wolfe, same question to you.

MR. WOLFE: Yes.

MR. WILLIAMS: Ms. Stine, if you were selected as a juror in this case, and the defense of insanity was urged during the trial, could you listen to it, consider it, and then reject it or accept it?

MS. STINE: Yes, I could.

[92] [931] MR. WILLIAMS: Okay. Good.

Are there any of y'all who have served on juries before?

Okay. Let's see, Ms. – And I'm not being rude to you, but you're not going to be on this jury, so we're going to speed up to go to the people who –

Sir?

MR. SLANEY: I'm sorry. What did you ask?

MR. WILLIAMS: I was asking – And actually, those of you who have indicated that you could never consider the death penalty or that you would automatically impose it, you're not going to be on this jury. And so, just to speed this up for these people, I'm going to skip over y'all, and please believe me, you know, I mean no offense by doing that.

So, let's see, jury selection in the back. Ms. Simoneaux, you've been on a jury before?

MS. SIMONEAUX: Yes, I have.

MR. WILLIAMS: And was that here in Jefferson Parish, ma'am?

MS. SIMONEAUX: It was in Orleans Parish.

MR. WILLIAMS: Was it a criminal case or a civil case?

[93] [932] MS. SIMONEAUX: Civil.

MR. WILLIAMS: Civil case, okay. It was like a personal injury kind of case?

MS. SIMONEAUX: Yes.

MR. WILLIAMS: Were you the foreperson on that jury, or were you just one of the regular members?

MS. SIMONEAUX: I was a regular member.

MR. WILLIAMS: Okay. And did the jury award any money to the plaintiff, or did they rule in favor of the insurance company?

MS. SIMONEAUX: It was a –

(Court Reporter requests that prospective juror speak up.)

MS. SIMONEAUX: It was a manufacturer who was suing. The manufacturer was –

MR. WILLIAMS: Of a product that caused somebody to get hurt?

MS. SIMONEAUX: Right. And he didn't get money from that.

MR. WILLIAMS: Okay.

All right, Mr. Wolfe?

MR. WOLFE: [94] [933] Yes. That was a murder case.

MR. WILLIAMS: Okay. Was that here in Jefferson Parish?

MR. WOLFE: Yes.

MR. WILLIAMS: How long ago was that, sir?

MR. WOLFE: Fifteen years.

MR. WILLIAMS: Okay. Was it a first degree?

MR. WOLFE: Yes.

MR. WILLIAMS: All right. And do you recall the verdict of the jury?

MR. WOLFE: It was not guilty.

MR. WILLIAMS: Okay. Did the defendant testify in that case?

MR. WOLFE: Yes.

MR. WILLIAMS: Okay.

Let's see. Anybody else in the back row? Okay, first row? All right, Mr. Slaney, tell us what kind of case were you on?

MR. SLANEY: It was a criminal case in Federal.

MR. WILLIAMS: Okay. Federal Court?

[95] [934] MR. SLANEY: Yes.

MR. WILLIAMS: What kind of case was it?

MR. SLANEY: Embezzlement.

MR. WILLIAMS: Okay. And were you the foreman of the jury?

MR. SLANEY: No, I was not.

MR. WILLIAMS: All right. What was the verdict of the jury?

MR. SLANEY: Guilty.

MR. WILLIAMS: Guilty.

Okay, Mr. Simoneaux?

MR. SIMONEAUX: Yes, I did.

MR. WILLIAMS: What kind of case?

MR. SIMONEAUX: Second degree murder, two years ago.

MR. WILLIAMS: Was that here in Jefferson Parish?

MR. SIMONEAUX: Yes.

MR. WILLIAMS: All right. What was the verdict of the jury?

MR. SIMONEAUX: They had 11 guilty for second degree [96] [935] murder. I held out for manslaughter.

MR. WILLIAMS: Okay. All right. Let's see, anybody else in the first row?

Okay. Now, Ladies and Gentleman, you have heard Ms. DaPonte mention domestic violence, and once again, that is something that you may or you may not hear and obviously domestic violence, no matter who we are, that triggers a response in our mind, and it's probably 99 times out of 100, probably more than that, it's a negative response. And I want to know if there are any of you all who have that negative effect in your mind right now in this case regarding the mention of domestic violence.

Okay, Mr. Blum.

Is there anybody else? Once again – Ms. Simoneaux? It's only natural, and let me explain to you, and I'm glad you raised your hand so I can explain to you.

That, once again, is something that may or may not come up at the trial, okay? And let us assume that it does come up. If it does come up, the way it's going to come up is prior to the murder it will be alleged that there was domestic abuse, all right? And the reason that it – If it does come into evidence, it's going to be used. It's not to prove he did this murder, not to prove he was the one, but it's to prove one of the elements that needs to be proved, and remember that in a [97] [936] murder case you've got to prove that – And I'll give you an example that will make it real easy for all of you: You've got to prove, Number 1, that this is the fellow that did the murder. You've got to prove, Number 2, that when he did the murder, he had an intent to kill, specific intent to kill or inflict great bodily harm. And we've got to prove that at the time he had an intent to kill more than one person or inflict great bodily harm upon more than one person, and we've got to prove it happened in Jefferson Parish.

Now, the law allows the State, in some cases, very rarely, however, very rarely because generally you can't use evidence of other crimes or other offenses or other bad acts to try to prove somebody did the crime that they're on trial for. But in certain instances, you can do that, and if there is a question about somebody's intent when they commit a crime, and you can show through prior things that he did, that he intended to do what he did in this case, then it's allowed to be put into evidence.

Do you understand that? I'm trying to – And if you've got a question, please ask me, because I'll be happy to tell you about it, okay?

The law is also very clear that you can't find somebody guilty solely because they did something bad in the past.

That evidence of bad acts from the past will be [98] [937] to show one specific element of the crime that he's on trial for now. Let me give you an example: Let's suppose that you've got a case where there's a shooting, let's say a second degree murder. An example, I go to Mr. Olinde, and I point the gun at him, and I fire a shot at him, and I kill him, okay? And let's suppose that I go to trial and my defense is: The gun accidentally went off. I was just joking around. I didn't mean to pull the trigger and shoot him, okay? And let's suppose that evidence came in in the past that I had shot other people just like that, okay? Obviously, you can't convict me of this crime because I did it before, but you could certainly use that to show that it wasn't an accident, that I meant to do that sort of thing. So do you see the point? That's exactly what the point about domestic violence is, if it comes in at all.

Okay, so, let's go way back to where I was at the start. Regarding domestic violence, do you feel that if that does come up, you could listen to it and use it for the purpose for which it is offered, and that is, to show an element of the crime?

MS. SIMONEAUX: To a certain point.

(Court Reporter requests prospective juror to speak up.)

MS. SIMONEAUX: [99] [938] Yeah, to a certain point.

MR. WILLIAMS: Okay. Well, I guess the bottom line, and what Ms. DaPonte's going to ask you is: If the evidence does come in that he's committed domestic abuse before, are you automatically going to find him guilty of this crime of first degree murder?

MS. SIMONEAUX: Yes.

MR. WILLIAMS: You would?

MS. SIMONEAUX: Yes.

MR. WILLIAMS: Okay. So if it's alleged that he committed domestic violence in the past, that you would automatically find him guilty of this crime?

MS. SIMONEAUX: Yeah.

MR. WILLIAMS: Okay.

Is there anybody else who feels that way? Okay.

All right, Ladies and Gentlemen, once again, like I said, I'm trying to be brief. We're going to try to get the jury selected today and start the trial today and let everybody else go home, but I don't want to miss anything, and I don't know you all at all, and I need to know if there's any of you all who need to tell me something about your ability to sit in [100] [939] this case, whatever it is.

Well, Mr. Simoneaux, you're not going to sit in this case. I hate to – I hate to tell you that, sir, but you're –

MR. SIMONEAUX: I know I'm not going to be here.

MR. WILLIAMS: – going to go home in about 20 minutes.

MR. SIMONEAUX: Must be my age.

MR. WILLIAMS: Okay. Unless you change your mind about how you feel about the death penalty.

Okay. No offense, sir. I really mean that.

Is there anything that anybody would like to say at this time regarding their ability to sit as a juror, having heard everything you've heard over the last two days?

Thank you very much. I'll tender the panel.

MS. DaPONTE: I'm also going to skip the individuals who've indicated for some reason that they would not be appropriate jurors on this case. So again, no offense, but I'll be talking mostly to Mr. Wolfe, Mr. Africh, Ms. Savoie, Ms. Dyess, Ms. Walker, and Ms. Stine.

Well, first of all, let me ask that open-ended question at the beginning: [101] [940] Does anybody have anything they need to tell me, after hearing everything I've said yesterday and today?

Ms. Stine, could you, right now, presume that Mr. Snyder is innocent of the charges?

MS. STINE: Yes, for right now.

MS. DaPONTE: Okay. So, if you were to vote right now, it would be not guilty, right?

MS. STINE: Not guilty.

MS. DaPONTE: And you've already answered that question. I remember Mr. Williams asked you.

Ms. Dyess, about you? Could you presume him innocent?

MS. DYESS: 90 percent or higher and listen to what he says.

MS. DaPONTE: Right. And so right now, if you had to vote, you'd have to vote not guilty, right?

MS. DYESS: Right.

MS. DaPONTE: Okay. And everybody else feels the same way. Okay.

And because he's presumed to be innocent, he is not required to do anything. Can you give him that, Ms. [102] [941] Dyess? He's presumed innocent so he doesn't have to prove that he's innocent. Would you agree with that?

MS. DYESS: I don't understand.

MS. DaPONTE: I'm sorry. Let me ask you this: Would you require Mr. Snyder to take the witness stand in his own defense? Would you need to hear from Mr. Snyder? Would you need him to testify?

MS. DYESS: No.

MS. DaPONTE: Okay. How about you, Mr. Africh?

Would you need him to testify?

MR. AFRICH: No.

MS. DaPONTE: How about you, Mr. Wolfe?

MR. WOLFE: No.

MS. DaPONTE: You could give him that presumption of innocence?

MR. WOLFE: Yes.

MS. DaPONTE: You're not going to hold it against him if he doesn't?

MR. WOLFE: No.

MS. DaPONTE: How about you, Ms. Stine? You could [103] [942] – I'm sorry.

MS. STINE: Well, repeat that.

MS. DaPONTE: I'll repeat it, because I'm confused, if he doesn't take the witness stand today, will you hold that against him?

MS. STINE: No.

MS. DaPONTE: If he doesn't take the witness stand in this trial?

MS. STINE: No.

MS. DaPONTE: You would not. You would let him rest on his presumption of innocence?

MS. STINE: Yes.

MS. DaPONTE: Is domestic violence a – Well, it's definitely a hot-button issue. Is it so inflammatory that anybody else feels like Mrs. Simoneaux and would be unable to continue the presumption of innocence? In other words, does anybody feel like hearing about domestic violence is going to make them vote guilty no matter what the evidence shows?

Ms. Dyess, how about you?

MS. DYESS: No.

MS. DaPONTE: Mr. Africh?

[104] [943] MR. AFRICH: No.

MS. DaPONTE: Ms. Walker?

MS. WALKER: No.

MS. DaPONTE: MR. WOLFE?

MR. WOLFE: No.

MS. DaPONTE: Ms. Stine?

MS. STINE: No.

MS. DaPONTE: You know, it's been a long time since we've talked about the burden of proof. I don't think we've done that today, and I don't want to hit it too hard, but I do just want to make sure that we're all still clear.

We talked about Ms. Simoneaux sitting on a civil trial, and Ms. Simoneaux could tell all of y'all that the burden of proof in a civil case is just a little bit more than not. It's just a little tip of the scale. If it's more likely than not that something happened, then you vote that way. But in a criminal case, the burden of proof is much greater. It's proof beyond a reasonable doubt, and if you don't find proof beyond a reasonable doubt as to all of the elements, then you cannot vote guilty, and I just wanted to remind [105] [944] everyone that the standard of proof is very, very, very high in a criminal case. Everybody could give this case that seriousness?

And, Mr. Wolfe, you sat on a criminal case, so you know the burden of proof is much, much greater, right?

MR. WOLFE: Yes.

MS. DaPONTE: All right.

Let's talk about the responsive verdicts to first degree murder, which would be not guilty, guilty of manslaughter or guilty of second degree murder. Again, guilty of second degree murder just means murder with the specific intent to kill or commit great bodily harm. Manslaughter is a homicide which would ordinarily be murder. It would be a first degree murder, or it would be a second degree murder because all of the elements fit. But because it was committed

during heat of passion or heat of blood, caused by provocation, which was sufficient provocation that you as a jury believe an average person would also have lost – Not would, I'm sorry. I don't think that that is the standard that an average person would have, because clearly, you put ten average people in a room and you give them a lot of provocation, maybe only one of those average people would have reacted in such [106] [945] a violent manner. But if the jury determines that that is average, that is what an average person could do, than the crime can be committed to manslaughter – I mean, can be mitigated to manslaughter. And again, when we talk about mitigation, we are not talking about an excuse. We're talking about a different crime.

How do you feel about that, Mr. Africh?

MR. AFRICH: I think I can consider it.

MS. DaPONTE: Okay. Mr. Wolfe?

MR. WOLFE: I could consider it.

MS. DaPONTE: Ma'am, when we're talking about manslaughter, do you understand – Do you see what I'm getting at when I'm talking about a crime that would really be a murder because all of the elements fit? It would be a first degree murder or it would be a second degree murder, but it was committed in the heat of passion or heat of blood that you, as a juror, would decide was sufficiently caused by provocation. Do you think you could consider that?

MS. SAVOIE: Yes.

MS. DaPONTE: All right. Can you conceive of an example of something that might be [107] [946] manslaughter rather than murder?

MS. SAVOIE: Yes.

MS. DaPONTE: Okay. Can you give us an example?

MS. SAVOIE: I think y'all already said the example.

MS. DaPONTE: And you followed along –

MS. SAVOIE: For instance, like someone raping your child, killing your child, and the person murders that person.

MS. DaPONTE: How about you, ma'am? Could you conceive of a –

MS. DYESS: I would consider it.

MS. DaPONTE: You'd consider that, Ms. Walker?

MS. WALKER: Yes.

MS. DaPONTE: Okay. Ms. Stine?

MS. STINE: Yes, I would.

MS. DaPONTE: Mr. Williams is correct. There are two pleas entered here, not guilty and not guilty by reason of insanity. I think that Mr. Williams asked all of the questions that I would have asked about the insanity defense, and I believe that [108] [947] all of you that I'm still speaking with have indicated that you could consider that as a valid defense. Does everybody agree with that statement?

All right. And if you reject that as a valid defense, Mr. Snyder still has his not guilty plea, and could you still consider all of the range of verdicts and all of the possible defenses that are presented as to the not guilty plea? Could everybody still consider that?

MS. STINE: Yes.

MS. DaPONTE: Ms. Walker?

MS. WALKER: Yes.

MS. DaPONTE: I have no further questions for you. Thank you.

MR. VASQUEZ: Mr. Africh, are there some first degree murders where perhaps the death penalty is not appropriate in your mind?

MR. AFRICH: Yes –

MR. VASQUEZ: What you're telling me then, sir, is that you can keep an open mind, and you will automatically impose the death penalty if you find Allen Snyder guilty of first degree murder?

MR. AFRICH: Repeat that.

[109] [948] MR. VASQUEZ: Okay.

MR. AFRICH: I don't necessarily think the death penalty is automatically imposed.

MR. VASQUEZ: Okay. You're willing to hear both –

MR. AFRICH: Yes.

MR. VASQUEZ: – sides when it comes to the –

THE COURT: I'm dismissing her for cause. Okay?

MS. DaPONTE: Jennifer Miller, has she already been – I'm sorry. Are we –

THE COURT: We did Mr. Provensal?

MS. DaPONTE: We all met Mr. Provensal, Roland Provensal, and I –

THE COURT: Dismiss him for cause.

MR. OLINDE: Who are you dismissing, Judge?

MR. WILLIAMS: Provensal, the guy whose name you couldn't pronounce. He became "sir."

MR. OLINDE: Well, that's because I couldn't read my own handwriting. Look at that. Could you read that?

MS. DaPONTE: Lloyd Morvant, I'll issue a challenge for cause.

MR. WILLIAMS: Objection. I rehabed him. He never, never, ever said that he couldn't do it. You put some words in his mouth.

MR. VASQUEZ: I did not. He said, "eye for an eye." I couldn't do a better job, if I put those words in his mouth.

[229] [1068] MR. WILLIAMS: An eye for an eye by itself doesn't mean anything.

MR. VASQUEZ: That's why when I asked him –

MR. OLINDE Judge, he may be leaning towards the death penalty, but he didn't say he would not –

MR. WILLIAMS: He said he could consider both when I traversed him.

MR. OLINDE: He did.

MR. VASQUEZ: Well, he's inconsistent, because when I asked him the questions, he said, Hey, it's a first degree murder, the question is I don't want –

THE COURT: well, let's get him up here.

Mr. Morvant, would you come over here, sir?

(Mr. Morvant joins the Judge and counsel at the bench out of the hearing of prospective jurors.)

THE COURT: Assume we've reached the penalty phase of the case, will you be able to consider the mitigators and the aggravators in whether you give him death or life?

MR. MORVANT: Like I say, Judge, once he's proven guilty of first degree murder, you know, [230] [1069] it will be hard to come down from that. But I will listen to everything, you know, all the evidence. If it's real strong, I guess I could –

THE COURT: I'm sorry?

MR. MORVANT: I say if the evidence, you know, will show me different, you know, in a big way, but basically when you shoot somebody, you know, you lose your life. If you kill somebody, you die, opposite from the capital punishment disbelief.

MR. WILLIAMS: Well, I have a question. The bottom line, Mr. Morvant, is: Could you listen to all of the evidence before you make your decision, or would you,

without regard to what the evidence was, automatically impose the death penalty?

MR. VASQUEZ: Wait –

MR. WILLIAMS: That's enough. That's all there's going to be.

MR. MORVANT: On that level, listen to everything and consider everything, it would have to be real good, be real strong.

MR. VASQUEZ: May I ask him a question, Judge?

THE COURT: Sure.

MR. VASQUEZ: [231] [1070] Sir, I'm not trying to pick on you, but I'm a little bit confused because your response, and maybe it's my question, but your responses to my questions and the D.A.'S are a little bit different. The question is: You've already found him guilty of first degree murder. Now, the only two options, and we're not talking about guilt or innocence anymore, is life imprisonment or the death penalty.

You're telling Mr. Williams that you would consider everything, but then you're also saying if you take somebody's life, then that's the end of it.

MR. MORVANT: Right.

MR. VASQUEZ: You deserve to die.

MR. MORVANT: Right.

MR. VASQUEZ: Okay. You are now at the stage where you have found that Mr. Snyder has taken somebody's life. Can you –

MR. MORVANT: I would say – I'd say take his life.

MR. VASQUEZ: Is there –

MR. MORVANT: And stick by it as long as I possibly could.

MR. VASQUEZ: And what?

MR. MORVANT: [232] [1071] It would be hard to convince otherwise.

MR. OLINDE: Since Caesar got to ask a question, can I ask a question, too?

MR. WILLIAMS: No. No, you can't.

Mr. Morvant, do you understand the distinction here is if you've made up your mind before you hear any evidence it's one thing, but if you tell us you could listen to what they have to say, even though you're leaning is very clear, that you believe strongly in the death penalty?

MR. MORVANT: If he's killed another human being.

MR. WILLIAMS: I understand that, sir, but if they want to put on evidence to try to show you why you should give him life in prison, could you listen to that evidence?

MR. MORVANT: I could listen to it.

MR. WILLIAMS: Could you consider it?

MR. MORVANT: I'd consider it.

MR. VASQUEZ: Could you seriously consider it?

MR. MORVANT: I –

MR. WILLIAMS: Your Honor, there's no serious –

MR. MORVANT: [233] [1072] If I want to talk double –

MR. WILLIAMS: Judge, I object. He's answered.

MR. VASQUEZ: I want his answer.

MR. WILLIAMS: He doesn't have to answer that. It's just –

THE COURT: I'm going to allow him to ask the question.

MR. VASQUEZ: Everybody could consider everything, and I'm not picking on you –

MR. MORVANT: No, no. I understand.

MR. VASQUEZ: – but could you seriously consider it?

MR. MORVANT: If enough evidence was put before me. It would have to be really, real strong, because I believe, like you say –

MR. VASQUEZ: Are you speaking of evidence of guilt or innocence, or are you speaking of what we're referring to –

MR. MORVANT: Okay. You're telling me a man said or he was proven guilty of first degree murder –

MR. VASQUEZ: Yes, sir.

MR. MORVANT: [234] [1073] What do I give? I'd give him the injection.

THE COURT: Thank you.

MR. WILLIAMS: Thank you, sir.

(Mr. Morvant rejoins prospective jurors remaining outside the hearing of prospective jurors.)

MR. WILLIAMS: Judge, I'm going to object. I mean, we're probably through now, but if I got up and I asked about a waste of taxpayers' money, that's a mistrial. They can't do it if I can't do it.

MR. VASQUEZ: Judge, it's been asked –

THE COURT: I've already ruled on that, okay? I'm going to allow the challenge for cause on Mr. Morvant.

MS. DaPONTE: Your Honor, as to Roland Laws, we would issue a challenge for cause.

MR. OLINDE: He made it very clear that he could consider both. I traversed him.

MS. DaPONTE: Actually, what he said was, there wasn't anything that he could think of that would cause him to give somebody a life sentence.

MR. WILLIAMS: And when I traversed him, I asked him [235] [1074] the specific –

THE COURT: Well, let's bring Mr. Laws up.

Mr. Laws, will you come up, sir?

MR. WILLIAMS: It's all right. If we've got to go another round, we've got to go another round.

(Mr. Laws joins the Judge and counsel at the bench out of the hearing of the prospective jurors.)

MS. DaPONTE: Mr. Laws, I was confused about your answers about whether you could consider giving a life sentence. You've already found Mr. Snyder guilty of first degree murder, okay?

MR. LAWS: Uh-huh (affirmative reply).

MS. DaPONTE: You're now at the penalty phase.

MR. LAWS: Right.

MS. DaPONTE: You'll hear about aggravating factors from the State, and then you will hear about mitigating factors from the Defense. Could you consider those mitigating factors in determining whether to give – I'm sorry – Could you consider giving him a life sentence, first?

MR. LAWS: I guess my confusion is in the example that you gave. It seems to me that that would come out during the trial.

[236] [1075] MS. DaPONTE: You're right.

MR. LAWS: And if that were to come out during the trial, the instance he gave and something of that magnitude where if someone did something to my daughter, for example, and I went nuts and I shot him, I don't believe that I would be found and I don't believe that I could find someone who did the same thing, guilty of first degree murder. I would find him guilty of manslaughter or a lesser crime. They killed him, but they didn't intentionally go out and just want to kill somebody. But what you're talking about and what I perceive you to be talking about is mitigating circumstance, i.e., his mother comes up. He's a great kid. Spare his life. If I found him guilty, and I say

him, anyone guilty of first degree murder, those kinds of things would weigh not one iota in my decision to find him and put him to death.

MS. DaPONTE: Okay. And let me ask you –

MR. LAWS: That's what I – And I may be totally wrong in how the process works, but I'm trying to answer the question as honestly as I can.

MS. DaPONTE: Can I just ask you a question? When you're talking about the scenario that Mr. [237] [1076] Olinde gave you –

MR. LAWS: Uh-huh (affirmative reply).

MS. DaPONTE: You know which one I'm talking about, the guy being – The guy going out and shooting somebody because he hears his son being killed over the phone.

MR. LAWS: Right.

MS. DaPONTE: You're telling me that in that circumstance, there would be no penalty phase because you would not be –

MR. LAWS: That's exactly right. He'd be found guilty of manslaughter –

MS. DaPONTE: Okay.

MR. LAWS: – or a lesser crime. I would not find someone –

MS. DaPONTE: Okay.

MR. LAWS: – in that case guilty of first degree murder.

MS. DaPONTE: All right.

MR. OLINDE: Well, let me ask you some questions, Mr. Laws, and that is: Is there only that distinction for you between manslaughter and murder, or is there a middle ground to [238] [1077] where – I'm sorry – To where – And that's one example that I gave.

MR. LAWS: And I guess it confused me more than it helped me.

MR. OLINDE: Right. Well, I mean, there are typically others. What if the –

MR. WILLIAMS: Just hold on a second. This is going nowhere.

Mr. Laws, if we get in the penalty phase, you're going to have to make a decision along with the other 11 jurors of whether the man should get the death penalty or he should be sentenced to life in prison.

MR. LAWS: Correct.

MR. WILLIAMS: When it's our turn to put on evidence, we're going to put on evidence about aggravating circumstances and about his background and about the things that surrounded the murder –

MR. LAWS: Uh-huh (affirmative reply).

MR. WILLIAMS: – then we rest. Then they on put on evidence. They have a whole list of things they can put on. You've heard a number of them. They can beg for mercy. They can do a lot of things. They can put on evidence that he has no prior record. [239] [1078] They can put on evidence that he had mental defect, that his doctors came up and said he was abused as a child or he was on

drugs, tons of things that they're going to ask you to consider. They don't – You don't have to believe them. Like if somebody got up and begged for mercy, it doesn't have to mean anything to you, but what they need to know is: Can you listen to that, and then after you hear all of the evidence, make your decision? That's the bottom line.

MR. LAWS: The way you posed the question to me, yes, I could.

MR. WILLIAMS: That's the only thing that's – is if you could listen to all of the evidence without your mind being made up before you go in. That's the bottom line.

MR. LAWS: The way you asked the question, I would have to answer that question, yes, I could.

THE COURT: Thank you.

(Mr. Laws rejoins prospective jurors remaining outside the hearing of prosective [sic] jurors.)

THE COURT: I'm not going to dismiss him for cause.

MS. DaPONTE: Note our objection, please. I would note that objection on Your Honor's [240] [1079] ruling. And as to Julie Kaiser we would move to challenge for cause.

MR. WILLIAMS: No objection.

MS. DaPONTE: And as to Joy Wappler we would move to challenge for cause.

MR. WILLIAMS: No objection.

MS. DaPONTE: Thank you.

THE COURT: How many jurors do we have?

MR. WILLIAMS: Eleven.

THE COURT: All right.

MR. WILLIAMS: The State excuses Ms. Devillier.

THE COURT: All right.

MR. WILLIAMS: The State accepts Mr. Fontan.

MR. VASQUEZ: What challenge is the State on, 11?

MR. OLINDE: That was our 11th.

MR. WILLIAMS: Yes, our 11th.

MS. DaPONTE: Judge, the Defense would exercise a backstrike against John Donnes.

MR. WILLIAMS: Well, you went and called Burt?

[241] [1080] You're keeping my old man; are you crazy?

MS. DaPONTE: So, that's 11 for us now.

THE COURT: The only trouble with him is he had a two o'clock appointment that was so important. Do you think he would be able to make it into being here for two days? We should have gotten rid of him sooner.

MS. DaPONTE: I know. I know. It's my fault. It's true. Oh, well.

THE COURT: What about Mr. Fontan?

MR. VASQUEZ: How many jurors are there, 11?

MR. OLINDE: Ten, now.

MS. DaPONTE: We've gotten it down to ten.

MR. OLINDE: You've got one strike left.

MS. DaPONTE: Right.

I'm sorry. Has Fontan been accepted by the State?

MR. WILLIAMS: Yes.

MS. DaPONTE: Okay. We'll accept Mr. Fontan.

THE COURT: What about Mr. Chatellier?

MR. WILLIAMS: Accept Mr. Chatellier.

[242] [1081] (Off the record discussion.)

THE COURT: Are y'all ready?

MR. VASQUEZ: Wait just a minute, please.

MS. DaPONTE: Where are we?

THE LAW CLERK: Chatellier, Michael Chatellier.

MS. DaPONTE: He's been accepted by the State?

MR. VASQUEZ: Wait. Did we accept Fontan?

MS. DaPONTE: We accepted Fontan.

MR. WILLIAMS: Fontan is Number 11.

MS. DaPONTE: We each have 11 challenges, correct?

THE LAW CLERK: Yes.

MS. DaPONTE: And we will challenge Mr. Chatellier.

THE COURT: What about Ms. Mulviill [sic]?

MR. WILLIAMS: We challenge.

MR. OLINDE: One second. One second. Okay. We're going to take Laws as our pick on the jury. We're going to agree on Mortillaro (sic) or whatever her name is as the alternate, and we don't have to do another round?

[243] [1082] MS. DaPONTE: On who?

MR. VASQUEZ: She's kind of neutral.

MR. OLINDE: Who, Mulvihill?

MS. DaPONTE: Well, we have our two alternates?

MR. OLINDE: Well, it's going to be a relatively short trial.

MS. DaPONTE: Fine. That's fine.

MR. OLINDE: Because, I mean, obviously we would have to – Unless you all are willing to waive, we'd have to cut her and accept him. We're going to have to use our 12th juror, but if you all want to waive that and say we can have him and just take – agree on her as the alternate, we can do that right now. She's middle of the road.

MS. DaPONTE: I know. She'd be fine.

MR. WILLIAMS: Your Honor, the State challenges Ms. Mulvihill and accept [sic] Mr. Laws.

MS. DaPONTE: Do we have to bring up the whole panel for the alternate?

MR. OLINDE: Why don't you agree with her? She's middle of the road.

MS. DaPONTE: [244] [1083] Because I don't want it – If I need to preserve error, I need to preserve error. If we can bring up, like, maybe –

MR. WILLIAMS: Wait, listen. We'll have to pick two alternates. Each side gets one additional peremptory challenge.

THE COURT: Right.

MR. WILLIAMS: And we'd better do a whole box because we don't know how many are going to say no death and they're automatic. And we shouldn't tell them they're alternates, either, because then they really want to run.

MR. VASQUEZ: I agree with that.

MS. DaPONTE: You're right. Okay.

(The following is taken within the hearing of prospective jurors.)

THE COURT: All right. The Court would like to thank and excuse everyone but Mr. Fontan and Mr. Laws.

THE COURT: All right. Swear them in.

(Whereupon, chosen jurors are sworn to hear the case.)

THE COURT: Please escort them to the Jury Room.

(Jurors exit Courtroom.)

THE COURT: [245] [1084 All right. Let's call 13 more names.

THE CLERK: Number 289, Mary F. Juneau.

THE COURT: Let's issue an attachment.

THE LAW CLERK: Issue an attachment for Mary Juneau.

Number 127, Helen A. Daigle.
Number 594, Jacquelyn S. Woods.
Number 186, Paula D. Fonti.
Number 453, Theodore Posner, Jr.
Number 480, Elaine B. Ronquille.
Number 252, Harold J. Heno, Jr.
Number 537, Margaret A. Tardo.
Number 448, Albert C. Pollard.
Number 18, Edmond N. Authement, Jr.
Number 71, Kathleen Brignac.
Number 41, Russell Bergeron, Sr.
Number 312, Michael Knight.
Number 226, Dawn Gray.

THE COURT: All right. Please give us your name and address, spouse's name and marital status, if you are married and also the spouse's employment if she or he is employed.

MS. DAIGLE: I'm Helen Daigle. I live at 42 Gretna Boulevard. I'm 75 years old, and I'm a widow. I have four children and three grandchildren.

MS. WOODS: My name is Jacquelyn Woods. I'm employed as an educational consultant. I [246] [1085] am married. My husband is director of retail sales. I have two children, ages nine and five, and I live at 845 Fairfax Drive in Terrytown.

MS. FONTI: My name is Paula Fonti. I live at 225 West Esplanade in Metairie. I am an executive administrator for a maternity and adoption agency. I am divorced. I have 2 children, ages 29 and 28.

MR. POSNER: My name is Theodore F. Posner, Jr., 2681 Highland Drive, Gretna. I'm self-employed as a distributorship of snack food products. I am divorced, and I have 1 daughter, 19 years old.

MS. RONQUILLE: My name is Elaine B. Ronquille. I'm married. My husband and I both work at Barriere Construction. I'm the executive assistant. I have two children, ages three and eight.

MR. HENO: I'm Harold Heno. I'm claims vice-president for Safeway, Inc. My wife is a volunteer coordinator for Associated Catholic Charities. I have two adult children. I live at 4704 Sheridan Avenue in Metairie.

MS. TARDO: Margaret Tardo, 3005 Kingman. I'm single and I have 2 children, 26 and 25. I'm a legal secretary.

MR. POLLARD: [247] [1086] Albert Pollard, offshore driller for Pryor Offshore. (Spelled Phonetically) I'm married, two kids. My wife's a secretary.

MR. AUTHEMENT: My name is Edmond Authement, Jr. I live at 105 Dorothy Drive in Avondale. My wife and I have 3 children, 32, 28, and 26.

MS. BRIGNAC: Kathleen Brignac. My husband and I both work for Entergy Corporation. We have 2 children, 17 and 14, and I live at 3873 Lakeland Drive in Gretna.

MR. BERGERON: Russell Bergeron, 716 Wiegand Drive, Bridge City. Divorced, and I have 3 sons, 48, 40, and 38. Retired from Avondale, 38 years.

MR. KNIGHT: My name is Michael Knight. I live at 1921 Borden in Terrytown. I work for Winn-Dixie. I'm married. My wife works for State Farm, and I have one child, 3 years old.

MS. GRAY: My name is Dawn Gray. I live at 630 3rd Avenue in Harvey. I'm a teacher at Patriot Day Care, and I'm single, and I have a two-year-old son.

THE COURT: Please answer the questions of the attorneys.

MR. OLINDE: Ms. Daigle, if you were selected as a [248] [1087] juror in this case and you reached the penalty phase, could you consider the imposition of the death penalty upon Allen Snyder?

MS. DAIGLE: I'm sorry. Would you repeat this.

MR. OLINDE: Ms. Woods, if you reached the penalty phase in this case, having found Allen Snyder guilty of first degree murder, could you personally consider imposing the death penalty upon him?

MS. WOODS: Yes, I could.

MR. OLINDE: Ms. Fonti, if you reached the penalty phase and you found Allen Snyder guilty of first degree murder, could you personally consider imposing the death penalty upon him?

MS. FONTI: Yes, I could.

MR. OLINDE: Mr. Posney (sic), if you found him guilty of first degree murder, could you personally consider imposing the death penalty upon him?

MR. POSNER: No, I could not.

It's Posner.

MR. OLINDE: I'm sorry.

MR. POSNER: P-O-S-N-E-R.

MR. OLINDE: [249] [1088] Is this based upon a longstanding personal, religious or moral belief that you hold, sir?

MR. POSNER: Yes, it is.

MR. OLINDE: Is anybody going to change your mind?

MR. POSNER No.

MR. OLINDE: I won't go with the questioning.

Ms. Ronquille, if you found Allen Snyder guilty of first degree murder, could you personally consider imposing the death penalty upon him?

MS. RONQUILLE: Yes, I could.

MR. OLINDE: Mr. Heno, if you found Allen Snyder guilty of first degree murder, could you personally consider imposing the death penalty upon him?

MR. HENO: Yes, sir.

MR. OLINDE: Ms. Tardo, if you found Allen Snyder guilty of first degree murder, could you personally consider imposing the death penalty upon him?

MS. TARDO: Yes.

MR. OLINDE: Mr. Pollard, if you found Allen Snyder guilty of first degree murder, could you personally consider imposing the death [250] [1089] penalty upon him?

MR. POLLARD: Yes.

MR. OLINDE: Mr. Authement, if you found Allen Snyder guilty of first degree murder, could you personally consider imposing the death penalty upon him?

MR. AUTHEMENT: Yes.

MR. OLINDE: Ms. Brignac, if you found Allen Snyder guilty of first degree murder, could you personally consider imposing the death penalty upon him?

MS. BRIGNAC: Yes, sir.

MR. OLINDE: Mr. Bergeron, if you found Allen Snyder guilty of first degree murder, could you personally consider imposing the death penalty upon him?

MR. BERGERON: Yes, sir.

MR. OLINDE: Mr. Knight, if you found Allen Snyder guilty of first degree murder, could you personally consider imposing the death penalty upon him?

MR. KNIGHT: Yes.

MR. OLINDE: All right. Ms. Gray, if you found Allen Snyder guilty of first degree murder, could you personally consider [251] [1090] imposing the death penalty upon him?

MS. GRAY: No, sir.

MR. OLINDE: I'm sorry?

MS. GRAY: No, sir.

MR. OLINDE: Is that based upon a longstanding personal, religious, or moral belief that you hold?

MS. GRAY: Yes, sir.

MR. OLINDE: Is there anything anybody's going to say that's going to change your mind about the facts and circumstances? You've heard all that, right?

MS. GRAY: Yes, sir.

MR. OLINDE: You're firm in your convictions on that?

MS. GRAY: Yes.

MR. OLINDE: I think that I've tried to explain at length about what the process in the penalty phase is about, and it's not whether you're leaning one way or another. It's whether you can hear all the evidence both for the death penalty and against the death penalty and make your mind up based upon the evidence that you hear.

Ms. Daigle, are you able to do that as [252] [1091] far as deciding whether or not to impose a life or death sentence, if you reach the penalty phase? Could you listen to all of the evidence in the penalty phase, if we get there, before deciding whether or not to impose a life or a death sentence, or would your mind already be made up?

Did I not make myself clear, because I can do that, again? Are you automatically –

MS. DAIGLE: Well, really, I should have said probably no from the beginning, because I'm on medication for my heart. So I don't know if I should even –

MR. OLINDE: I'm sorry?

MS. DAIGLE: I'm under medication for my heart.

MR. OLINDE: Okay. Do you think that that will prevent you from –

MS. DAIGLE: I had two bypass surgeries.

MR. OLINDE: Do you think that that would – Do you think you're able to sit today because of your heart condition? This is a murder –

MS. DAIGLE: Right now, I could sit.

MR. OLINDE: Let me tell you, I want to be fair to you, too. This is going to be a murder case. There's going to be a lot of – Everybody's being a nice guy right now, [253] [1092] but once this trial starts, that's going to change quickly, and there's going to be a lot of intense stuff, especially of photographs and everything else.

MS. DAIGLE: I'm under medication.

MR. OLINDE: Are you able to tolerate that or not?

MS. DAIGLE: No.

MR. OLINDE: Okay. Well, I'm not going to – I'll move on.

Ms. Woods, would you listen to all of the evidence in the penalty phase before deciding whether or not you would impose a life or a death sentence?

MS. WOODS: Yes, I would.

MR. OLINDE: Ma'am, would you listen to all the evidence in the penalty phase before deciding whether to impose a life or a death sentence?

MS. FONTI: Yes, I would.

MR. OLINDE: Mr. Posney [sic], same question?

MR. POSNER: Well, I've already stated I –

MR. OLINDE: I'm sorry. You're right.

Ms. Ronquille, could you listen to all of the evidence before deciding whether to impose a life or death sentence?

[254] [1093] MS. RONQUILLE: If it would come to that –

MR. OLINDE: Yes, ma'am.

MS. RONQUILLE: – right?

MR. OLINDE: Correct.

MS. RONQUILLE: Yes, I would.

MR. OLINDE: Mr. Heno?

MR. HENO: If you persuade me to convict him of first degree murder, I believe the death sentence is entirely appropriate, and I would not be very likely to listen to anything further.

MR. OLINDE: And I'm – So, I'm not going to press you, but the question is: Would you not at all, or you're saying –

MR. HENO: The –

MR. OLINDE: – it's not very likely. It's – Are you automatic death, or is it possible that you could impose a life sentence? That's the question.

MR. HENO: I'm saying that there are possibilities and probabilities. Probably – There's a possibility of anything. The probabilities are very low for –

MR. OLINDE: [255] [1094] So you're leaning heavily towards the death penalty if you convict him of first degree murder. Is that a fair way to say it?

MR. HENO: Yes.

MR. OLINDE: But possibly, strong evidence of mitigation, there are some facts that would cause you not to impose the death penalty –

MR. HENO: It would have to –

MR. OLINDE: – even though you're leaning heavily in favor of it.

MR. VASQUEZ: Your Honor, could we let the jurors answer, please?

MR. OLINDE: I'm going to let you answer. Answer.

MR. VASQUEZ: He's cut him off two or three times.

MR. HENO: It would have to be very strong evidence for me.

MR. OLINDE: Okay. There is a possibility that that could happen.

Ms. Tardo?

MS. TARDO: Yes.

MR. OLINDE: Could you listen to all of the evidence before deciding on whether you [256] [1095] would vote for life or death?

MS. TARDO: Yes.

MR. OLINDE: Mr. Pollard?

MR. POLLARD: Yes.

MR. OLINDE: Mr. Authement?

MR. AUTHEMENT: Yes.

MR. OLINDE: Ms. Brignac?

MS. BRIGNAC: Yes.

MR. OLINDE: Mr. Bergeron?

MR. BERGERON: Yes.

MR. OLINDE: Mr. Knight?

MR. KNIGHT: They would have to have very strong evidence, you know? I'd listen, but they'd have to have very strong evidence.

MR. OLINDE: I don't want to go through the same scenario. Are you auto death, or are you just leaning heavily in favor –

MR. KNIGHT: No. Heavily.

MR. OLINDE: Ms. Gray, we've already talked with you. Thank you.

They've pled not guilty and not guilty [257] [1096] by reason of insanity. The insanity defense requires them

to meet two heavy burdens. The first is: They have to prove beyond a preponderance of the evidence that he has a mental defect which would render him, and here is the second high burden, not just that he might be insane, but that his insanity actually prevents him from appreciating the difference between right and wrong. Can you listen to evidence of that kind, and you decide whether to accept or reject that evidence? Are you capable of doing that, Ms. Daigle?

MS. DAIGLE: No.

MR. OLINDE: Ms. Woods, are you capable of doing that?

MS. WOODS: Yes, I am.

MR. OLINDE: Ms. Fonti, are you capable of doing that?

MS. FONTI: I am capable.

MR. OLINDE: Mr. Posner, I'm going to pass you. Ms. Ronquille, are you capable of doing that?

MS. RONQUILLE: Yes, I am.

MR. OLINDE: Mr. Heno, are you capable of doing that?

[258] [1097] MR. HENO: Yes, I am capable.

MR. OLINDE: Ms. Tardo, can you do that?

MS. TARDO: Yes.

MR. OLINDE: Mr. Pollard, can you –

MR. POLLARD: I'd like to say something with a statement with that.

MR. OLINDE: Sure. Go ahead.

MR. POLLARD: About the insane situation, well, I was married before, and I don't know if I can stand here or sit here, okay? And I was a victim of circumstances, underneath when my wife was cheating on me, in other words. So, I mean, I caught her. It was violent, and you know, you said the domestic violence, but, you know, I look at that in three phases. You have the abusive part; then you also have the oral – the voice, but you also have the mental part, you know, and nobody speaks of the mental part. They look at the abuse, but abuse comes in different sections.

So, – Well, when I did this – Well, what I'm trying to get at, I don't know if – I don't know what this case is. I never saw this guy. I've never – But I've been a victim of mental anguish as a man, you know, and no one speaks of that. But I've been this victim.

[259] [1098] MR. OLINDE: Well, let me ask me ask you a question?

MR. POLLARD: Oh, –

MR. OLINDE: Go ahead and finish. I don't want to cut you off.

MR. POLLARD: Okay. I'm not – I'm just saying I don't know if I'm qualified. I know nothing about this, but I don't know if I'm qualified to do this, because when I saw this, I lost it. And when I lost it – When I went in the room, the guy jumped and he pulled a gun on me. I defended myself with this. I never was convicted because nothing happened. Luckily, my brother came behind me, and he grabbed me. Well, I think I would have pulled the trigger, because I – He said I acted as a madman, and I

don't know if you can call that insanity or craziness or whatever. I loved her. It hurted me. But yet – And still, I would have done this. Would I would have been first degree murder, manslaughter? It really didn't matter at that time; so, I don't know if this kicks me off this jury or what, but I have to tell you that I was a victim of this, and at that time – I'm a Christian now, and at that time, I think I would have pulled the trigger.

MR. OLINDE: I don't want to go into particulars –

[260] [1099] MR. POLLARD: Well, yeah – Well, I'm just saying that when you asked the question that, you know, could – about your mental stability, you know, could you – Would you lean on that? I think I would because I've been there.

MR. OLINDE: Let me just ask you to answer my question and then I'll go in this; you can say whatever you want to say.

MR. POLLARD: Yeah.

MR. OLINDE: Can you hold them to the burden of proof on insanity, making them prove that? Could you do that?

MR. POLLARD: Yes.

MR. OLINDE: You could?

MR. POLLARD: Sure.

MR. OLINDE: And would the insanity have to be that he doesn't know the difference between right and wrong? Would you make that be – that is the law. Can you follow that law, or can you not follow that law?

MR. POLLARD: Yes, I can follow it.

MR. OLINDE: And I'll get to the domestic issue in one moment – I might as well ask you now: do you think, and I don't mean to put you [261] [1100] on the spot –

MR. POLLARD: Yeah.

MR. OLINDE: – but I'm saying that do you think it's ever, a man is justified in beating a woman under some circumstances?

MR. POLLARD: No, I don't.

MR. OLINDE: Okay. That's the only question I have for you on that one.

Mr. Authement?

MR. AUTHEMENT: Yes.

MR. OLINDE: A long time since I asked that question.

MR. AUTHEMENT: Yeah.

MR. OLINDE: Could you hold them to their burden of proof on insanity, and can you listen to that evidence and decide whether to apply it or reject it?

MR. AUTHEMENT: I don't think it's something that can just come that quickly and go away that quickly.

MR. OLINDE: Well, you haven't heard any of the evidence yet, right –

MR. AUTHEMENT: That's right.

MR. OLINDE: [262] [1101] – about what they have, when it came, how long it came; is that correct?

MR. AUTHEMENT: Right.

MR. OLINDE: Can you hold them – Let's take it one at a time: Can you hold them to the burden of proving the insanity? Can you hold – That's their burden, not ours. Can you hold them to that?

MR. AUTHEMENT: Like I say, I can't see the insanity would come and go that quickly. Rage or anger, maybe; but insanity, no.

MR. OLINDE: I understand and again, we don't know how long it was because we haven't heard any answers. The question is: They've got to prove that he didn't know the difference between right or wrong at the time of the commission of the offense because of a mental defect. When the evidence comes out, the evidence will come out, if it comes out. Can you follow the law in insanity, and it's up to you whether to accept or reject certain facts. That's your call. But the question is: Can you consider the evidence that's brought forward and decide whether to accept it or reject it?

MR. AUTHEMENT: Yes, sir.

MR. OLINDE: Okay.

Ms. Brignac, can you listen to the [263] [1102] evidence, hold them to their burden of proof and decide whether to accept it or reject it on the insanity issue?

MS. BRIGNAC: Yes, I do.

MR. OLINDE: Mr. Bergeron, Mr. Knight, the domestic abuse issue, if that is brought up by us, we're going to have to prove that to you, and you can decide whether or not we did prove that to you. You heard Ms.

DaPonte say very fairly yesterday that that evidence can be used for purposes of motive or intent to show that this wasn't some grand accident and relates to motive and intent. You can't say, If I find that this man has beaten this woman in the past, I'm going to convict him of murder. You cannot do that. We've got to be able to – You can use that evidence in conjunction with evidence that he committed the murder and draw the bridge, but you cannot say, Because I found that he may have beat her in the past, I'm voting guilty on the murder case. You cannot do that. Is there anyone who has a problem doing that, on the bottom row? Rather than asking each and every one of y'all, I'll ask you as a group. Anyone on the bottom row have a problem with that? Top row? Okay.

Presumption of innocence, can everyone let him start this trial off with a clean slate? He's sitting there, he starts off with a clean slate. Anybody have a [264] [1103] problem with that?

Can everyone guarantee him his Fifth Amendment rights, whether you want to hear him or you don't want to hear them, we've got to prove our case beyond a reasonable doubt. He's got the right to remain silent, if that's what his lawyers want him to do and if that's what he decides to do.

Is there anyone on the bottom row who has a problem with that concept or cannot apply that concept?

Is there anyone on the top row who has a problem with that concept? Mr. Bergeron?

MR. BERGERON: Yes. I think if the man is being charged with murder and all, it seems to me like he should be able to get up and state his case, tell the jury

what he did and what he didn't do and what kind of – you know, the reason. Silent, in my opinion, is like being guilty. That's the way I look at it. Why not just get up? Why take the Fifth Amendment? I mean, just get up and say what you got to say. I mean, what caused you to do this? If he did do it, what caused him to do it, things like that? I mean, being silent is not, in my opinion – Is not helping him out at all.

MR. OLINDE: I think your feelings are pretty strong on that; so, I'm not going to question you any further on that. [265] [1104] That's fine.

Anybody have any questions about anything that was asked before by any of the other lawyers that you need clarification on?

Is there any other reason someone could not sit as a fair and impartial juror on this case other than what's been covered already?

Thank you very much.

THE COURT: Ms. DaPonte?

I'd like to approach the bench, Judge.

(The following is taken outside the hearing of the prospective jurors.)

MR. OLINDE: I'm going to make a motion at this time that the defense not go into Mr. Pollard's situation anymore –

MS. DaPONTE: Oh, I agree. I agree.

MR. OLINDE: – because if it goes into the facts of this case, then it's not fair.

MS. DaPONTE: It doesn't really matter. There's no jurors here, but I wouldn't do it. Mr. Pollard. I don't have any problem with that.

MR. OLINDE: Yes. I don't want to go into the facts of his case. He's the second on the top towards you.

THE COURT: Do you want to challenge him for [266] [1105] cause?

MR. OLINDE: No. Well, not at this point in time, Judge, but I'm just talking about I don't want them to go into any more facts.

MS. DaPONTE: Right.

MR. OLINDE: If she's not going to do that, I accept that.

MS. DaPONTE: Right. That's fine. Thanks.

THE COURT: Let me say, I think Ms. Daigle is going to be frail and she is –

MS. DaPONTE: Oh, yes, we've agreed with –

MR. WILLIAMS: I looked at her, and I said consent. We were going to let her go. Let's let her go at the end. Let them voir dire and then –

MS. DaPONTE: I just have maybe two minutes more of voir dire.

MR. OLINDE: – because more people might get up.

(The following is taken within the hearing of the prospective jurors.)

MS. DaPONTE: Ladies and Gentlemen, I have about two questions for y'all, and that's about it. Unfortunately, I am going to have to go over something that Mr. Olinde has already gone over, just to make sure I [267] [1106] understand everybody.

Mr. Heno, did I understand you correctly that you can consider the insanity defense as a valid defense?

MR. HENO: I can.

MS. DaPONTE: You can?

MR. HENO: Yes.

MS. DaPONTE: And did I consider you – I'm sorry, Ms. Ronquille, did I hear you to say that as well?

MS. RONQUILLE: Yes, ma'am.

MS. DaPONTE: Okay.

Ms. Fonti?

MS. FONTI: Yes.

MS. DaPONTE: Ms. Woods?

MS. WOODS: Yes.

MS. DaPONTE: Ms. Tardo?

MS. TARDO: Yes.

MS. DaPONTE: Mr. Pollard?

Mr. Authement?

MR. AUTHEMENT: Remember, I had reservations.

MS. DaPONTE: [268] [1107] You did. You had reservations. Do you believe that people who do violent things generally know that what they're doing is wrong?

MR. AUTHEMENT: Well, there's some times that I've done some – Wanted to do some violent things. If I had a gun, I most probably would have shot somebody. I don't own a firearm.

MS. DaPONTE: Okay. And do you believe that someone could be suffering from a mental disease or defect to the extent that they would not know that it was wrong to blow up and kill somebody?

MR. AUTHEMENT: I don't think that they'd know if they had a mental defect.

MS. DaPONTE: I'm sorry?

MR. AUTHEMENT: I don't think they'd know if they had a mental defect.

MS. DaPONTE: They may not know, but do you think you might know? Do you think that if you're a juror and you heard evidence that someone did suffer from a mental disease or defect and that that mental disease or defect caused them not to know the difference between right and wrong, do you think that you could consider that? And I'm not even asking you if you're going to believe it. I'm just asking you: Do you [269] [1108] think that you could consider that that's a possibility, that someone could be so mentally deficient or – That's not the right word – That someone could have such a mental disease that he would not know right from wrong?

MR. AUTHEMENT: Sure.

MS. DaPONTE: You think that that's possible? All right. Now, do you –

MR. AUTHEMENT: But it doesn't go away that easily.

MS. DaPONTE: Okay. And you have a – Like Mr. Olinde said, you don't know whether we're going to say it's still present, right?

MR. AUTHEMENT: Correct.

MS. DaPONTE: Okay. Could you consider that as a possible defense in this case?

MR. AUTHEMENT: I don't know.

MS. DaPONTE: Okay. Thank you.

How about you, ma'am?

MS. BRIGNAC: I could consider it.

MS. DaPONTE: You could consider it?

MR. BERGERON: I don't think so.

MS. DaPONTE: Okay, Mr. Bergeron, you could not [270] [1109] consider insanity.

And, Mr. Knight, you could consider it?

MR. KNIGHT: Yes.

MS. DaPONTE: Okay.

Now, the difference here is that the plea is not guilty and not guilty by reason of insanity. Mr. Heno, if you found that Mr. Snyder did know right from wrong, whether he was suffering from a mental disease or defect or not, but the issue is: He did know right from wrong. Could you

then decide whether he was guilty or not guilty? In other words, could you still look at all the reasons why this might be a manslaughter instead of a murder, or whether they might have the wrong person and they didn't even prove up all the elements of their case? Could you do that?

MR. HENO: Yes, I could.

MS. DaPONTE: Okay.

And I'm going to ask everybody else the same question. If there's anyone who doesn't feel as Mr. Heno does, let me know. Everybody could consider those – Everybody could consider both pleas, not guilty by reason of insanity and not guilty? Okay.

All right. Let's talk about manslaughter. We talked – Everybody [271] [1110] already heard all the elements. You know what I'm talking about when I say manslaughter. Mr. Knight, you understand about the heat of passion and the immediate provocation?

MR. KNIGHT: Yes.

MS. DaPONTE: Okay. Could you consider that a homicide, which would ordinarily meet all of the definitions of a first degree murder or a second degree murder, might be mitigated to manslaughter by those elements that you've already heard about?

MR. KNIGHT: Yes.

MS. DaPONTE: Okay, and you could consider that? Mr. Heno, how about you?

MR. HENO: Well, the only crime of passion that I could think of would be coming in and finding your wife in bed with someone else or finding someone who had

molested your children. I think those would mitigate the elements of the crime down to manslaughter. That's heat of passion, to me. I would find it very difficult to see any other circumstances at work, for the manslaughter not to work.

MS. DaPONTE: All right.

Ms. Ronquille, could you see how something that might ordinarily be a murder could be mitigated to manslaughter?

[272] [1111] MS. RONQUILLE: I do. I think that in order to be a good juror, you have to have an open mind. You have to look at each piece of evidence and weigh these pieces of evidence, and then after the whole thing's laid out, then you figure it out, what exactly is there.

MS. DaPONTE: And do you think that you could do that?

MS. RONQUILLE: Yes, ma'am.

MS. DaPONTE: Good. Well, I don't think I need to ask you any more questions, Ms. Ronquille.

Ms. Fonti, do you think that a murder – something that would ordinarily be a murder could be mitigated to manslaughter because of those elements that we talked about?

MS. FONTI: Yes, I do.

MS. DaPONTE: Ms. Woods?

MS. WOODS: Yes.

MS. DaPONTE: Ms. Tardo?

MS. TARDO: Yes.

MS. DaPONTE: Mr. Pollard?

MR. POLLARD: Yes.

[273] [1112] MS. DaPONTE: Mr. Authement?

MR. AUTHEMENT: Possibly.

MS. DaPONTE: Okay.

Ms. Brignac?

MS. BRIGNAC: Yes.

MS. DaPONTE: Okay.

Mr. Bergeron?

MR. BERGERON: I feel the same way as he did.

MS. DaPONTE: That what he does, okay.

Did I ask you, Mr. Knight? I started with you.

MR. KNIGHT: Yes.

MS. DaPONTE: Okay.

I think that that is all I have at this point. Thank you very much.

MS. RONQUILLE: Excuse me.

MS. DaPONTE: I'm sorry.

MS. RONQUILLE: I've been on a jury before.

MS. DaPONTE: Thank you.

And is there anybody else that has anything else that I need to know? I'm going to ask you that question next.

[274] [1113] You've been on a jury. What was that?

MS. RONQUILLE: Aggravated rape.

MS. DaPONTE: Where was it?

MS. RONQUILLE: In Jefferson Parish, ten years ago.

MS. DaPONTE: Ten years ago? And the verdict of the jury in that case?

MS. RONQUILLE: Guilty.

MS. DaPONTE: And was it guilty as charged –

MS. RONQUILLE: Yes.

MS. DaPONTE: – of aggravated – Okay. And were you the foreman of that jury?

MS. RONQUILLE: No, ma'am.

MS. DaPONTE: Okay.

Any other trials?

MS. RONQUILLE: No.

MS. DaPONTE: Any other jurors? Ms. Tardo?

MS. TARDO: A civil matter.

MS. DaPONTE: Where was that?

MS. TARDO: Here, two years ago.

MS. DaPONTE: [275] [1114] Any money?

MS. TARDO: No. Criminal matter –

MS. DaPONTE: Okay.

MS. TARDO: – but it never went to trial, four years ago.

MS. DaPONTE: Okay.

MS. TARDO: Did not have a trial.

MS. DaPONTE: Back row. Anybody else, jurors?

Ms. Brignac?

MS. BRIGNAC: Robbery.

MS. DaPONTE: Where was that, here?

MS. BRIGNAC: Here.

MS. DaPONTE: Okay. What was the verdict of the jury?

MS. BRIGNAC: Guilty.

MS. DaPONTE: Was it armed robbery or simple robbery?

MS. BRIGNAC: Armed robbery.

MS. DaPONTE: Armed robbery? And it was a guilty verdict?

MS. BRIGNAC: [276] [1115] Yes.

MS. DaPONTE: Okay. Thank you.

MS. BRIGNAC: And I was not the foreperson.

MS. DaPONTE: You were not the foreman. Okay.

Mr. Heno?

MR. HENO: A civil, about 20 years ago. The case was settled.

MS. DaPONTE: Okay.

Anybody else in the front row? Okay.

Does anybody else have anything that I need to know about before I sit down? And thank you very much, Ms. Ronquille, for talking to me about the jury services.

MR. HENO: Well, you asked about crimes of violence –

MS. DaPONTE: Okay.

MR. HENO: – previously.

MS. DaPONTE: Yes.

MR. HENO: A very close friend of my daughter's was shot down on Canal Boulevard in New Orleans, and I saw what he and his family went through before he died.

MS. DaPONTE: Ted Alexander?

MR. HENO: [277] [1116] Yes.

MS. DaPONTE: And that's a very close – He was a very close friend of your daughter's?

MR. HENO: Yes.

MS. DaPONTE: You heard the questions that I asked on the last round. I'll ask the same questions of you: Could you be a fair juror having had that experience?

MR. HENO: I won't convict your client because of that –

MS. DaPONTE: That's all we can ask.

MR. HENO: – but I certainly am very strong in favor of the death penalty in those cases.

MS. DaPONTE: I appreciate your honesty. Thank you. Anybody else have anything like that that might affect – Yes, ma'am?

MS. FONTI: I don't have anything like that. I don't know why you asked this morning and yesterday about military and policemen –

MS. DaPONTE: Thank you. Thank you.

MS. FONTI: – but – and I don't –

MS. DaPONTE: Do you have a military background?

MS. FONTI: Well my son is in the Navy.

[278] [1117] MS. DaPONTE: In the Navy?

MS. FONTI: That is his profession.

MS. DaPONTE: Okay.

And anybody else have any military background? Mr. Bergeron?

MR. BERGERON: Three years in the Army, two years in New Guinea.

MS. DaPONTE: Oh, all right. And –

MR. HENO Six years in the United States Army.

MS. DaPONTE: And what was your rank when you left?

MR. HENO: Staff Sergeant: Also, I was with New Orleans Police Department for five years.

MS. DaPONTE: You were with the NOPD? How long ago was that?

MR. HENO: 30 years ago.

MS. DaPONTE: 30 years ago?

MR. HENO: Yes.

MS. FONTI: Also, my son-in-law is in the Army Reserve, and he is also a policeman in Lafayette, Louisiana.

MS. DaPONTE: In Lafayette, okay.

[279] [1118] Anybody else in the military? Yes, ma'am?

MS. BRIGNAC: My brother was in the Army, and I have two nephews in the Air Force.

MS. DaPONTE: Okay.

And anybody else, police officer or law enforcement experience? Mr. Knight?

MR. KNIGHT: My neighbor's with the police in Jefferson Parish.

MS. DaPONTE: All right.

MR. KNIGHT: And my dad's in the –

MS. DaPONTE: I'm sorry?

MR. KNIGHT: My dad and my brother's in the Army.

MS. DaPONTE: In the Army? Okay. Thank you.

And, Ms. Gray?

MS. GRAY: My sister's a deputy for the East Bank Lockup. So is my ex-brother-in-law, for the West Bank Lockup.

MS. DaPONTE: Anybody else? Anything else I need to know? I love this. You all did great.

Thank you.

That's it? All right. Mr. Vasquez has a couple of questions. Thanks.

MR. VASQUEZ: Mr. Heno, would your feelings [280] [1119] regarding Mr. Alexander's terrible death, would that affect you during the penalty phase of this particular case, if we get there?

MR. HENO: Yes, it would. I would be very – As I told Mr. Olinde, I would find it very difficult to find a set of circumstances that would mitigate such a crime.

MR. VASQUEZ: So that if I were to present to you evidence that Mr. Snyder was acting or was under some sort of extreme mental or emotional disturbance at the time of the crime, is that something that you could seriously consider?

MR. HENO: I would not consider that as an excuse.

MR. VASQUEZ: If I were to present evidence to you that Mr. Snyder lacked a significant criminal history in mitigation of a life versus death sentence, is that something that you could seriously consider?

MR. HENO: No, sir.

MR. VASQUEZ: Okay. What would I have to show you, and I'm putting you on the spot a little bit, but what would I have to show you, sir, that you would consider the possibility of a life sentence?

MR. HENO: I can't think of anything, to be [281] [1120] honest with you. If I convict him of first degree murder, I think the death penalty is entirely appropriate.

MR. VASQUEZ: And there's nothing – As you said, there's nothing that I could do to sway you from that opinion?

MR. HENO: No, sir.

MR. VASQUEZ: Thank you.

Ms. Tardo, if I'm – If we get to that point and you sat on the jury and you found Mr. Snyder guilty of first degree murder, are you able to keep an open mind and consider any possible mitigating circumstances that I may be able to present to you?

MS. TARDO: Yes.

MR. VASQUEZ: Okay. And you could also consider any aggravating circumstances which the State may or may not present to you?

MS. TARDO: Yes.

MR. VASQUEZ: Mr. Authement?

MR. AUTHEMENT: Yes?

MR. VASQUEZ: I wrote down a little bit of a note. You said you didn't believe in the insanity defense,

but let's say we're beyond that point, and let's say that you [282] [1121] found Mr. Snyder guilty. You've rejected the fact that he did not know right from wrong at the time of the offense, but now you just – you are determining life versus death. If I were to present evidence to you that he was under some sort of extreme mental or emotional disturbance – I'm not talking about that he didn't know right from wrong, but that he was under same sort of a disturbance like that – Is that something that you consider in mitigation of a life sentence?

MR. AUTHEMENT: No, sir. I think that once you commit murder, and even though there was some extenuating circumstances, that if there was – If you were under these extenuating circumstances, and you had your faculties at that time, you should have backed off.

MR. VASQUEZ: So you believe if you take someone's life, then your life should be taken?

MR. AUTHEMENT: In murder cases?

MR. VASQUEZ: In a first degree, and that is what this is, a first degree murder case.

MR. AUTHEMENT: Yes.

MR. VASQUEZ: Okay. Because obviously if you don't find first degree murder, then you don't ever have to see me again, because we wouldn't be in the penalty phase.

If I could have just a moment. Thank [283] [1122] you, Ladies and Gentlemen.

MR. OLINDE: Judge, I need to – a quick traverse.

Mr. Heno, as I've said before, the law doesn't – You don't have to make any agreements as to which mitigating circumstances are sufficient, given a first degree murder case. You have to be able to listen to them, consider them, and if there is a cumulative effort here and you hear something that would dissuade you from the death penalty and persuade you towards a life imprisonment verdict, is it possible that there could be sufficient mitigations in a hypothetical for you to be able to do that?

MR. VASQUEZ: Judge, can I object on two grounds? First of all, the gentleman doesn't have to do anything. It's totally up to him. He does not have to consider anything. I mean, that's why we're asking these questions. The other thing is, if it's possible. Mr. Heno's already answered that question. He said that anything's possible. He says there are possibilities and probabilities. So that's already been asked and answered.

THE COURT: All right. Objection sustained.

MR. VASQUEZ: Thank you.

MR. OLINDE: I have no other questions, if you all want to traverse.

[284] [1123] (The following is taken outside the hearing of the prospective jurors.)

THE COURT: All right. Challenges for cause.

MR. OLINDE: I think we can agree on Ms. Daigle, Mr. Posner, no doubt.

THE COURT: Ms. Daigle and Mr. Posner.

MR. OLINDE: There's one other, Ms. Gray.

I'm going to challenge Mr. Pollard for cause. I think that the situation that he was talking about was in the exact fact pattern of this case. I just don't think he's going to be a fair juror in this case; maybe in another case, but not in this case. I mean, it seems to me like he's trying – It could have been Allen Snyder sitting up in the chair saying the same thing. I mean, if you read Allen Snyder's statement and you know what he said, and Mr. Pollard is saying the exact same thing.

MR. VASQUEZ: The converse is true, we've had jurors that say that they've lost relatives, you know, who have been in a similar situation, and they've been allowed to sit.

MR. OLINDE: Those are general things. This guy, what he said, was the exact fact pattern of this case, and I know that they know that, and I don't think in this case he's [285] [1124] a fair and impartial juror.

THE COURT: I'm going to excuse Mr. Pollard.

MR. VASQUEZ: Please note our objection.

MS. DaPONTE: I just wanted to note for the record that Mr. Pollard is a black man.

MR. OLINDE: Do you want me to provide any reasons for a –

MR. VASQUEZ: No, we're not making a Batson challenge. We're just preserving the record.

MR. OLINDE: Well, he's being excused for cause is my understanding. If the cause would not hold up, Judge, my reasoning –

MR. WILLIAMS: No, you don't – Would you be quiet? You don't have to give one.

MR. OLINDE: Jim, look, please don't do that again.

MR. WILLIAMS: Fred – Okay. Don't put anything on the record that we don't have to put on.

MR. OLINDE: Please don't do that again.

MR. WILLIAMS: But don't –

MR. OLINDE: Then don't – Just don't do that again.

THE COURT: [286] [1125] All right. Any other challenges for cause?

MR. OLINDE: No, Judge.

MR. VASQUEZ: Okay. Judge, we'll challenge Mr. Heno for cause. He made it pretty clear.

THE COURT: I'm going to excuse Mr. Heno for cause.

MR. VASQUEZ: Mr. Bergeron?

MS. DaPONTE: Right.

MR. OLINDE: I agree. No objection.

MR. VASQUEZ: Is that all of our challenges?

MS. DaPONTE: That's it.

MR. VASQUEZ: That's all our challenges for cause, Judge.

THE COURT: Has Mr. Authement been excused?

MR. VASQUEZ: He said he doesn't believe in the insanity defense.

MS. DaPONTE: That's true. I – That's true, Judge.

MR. VASQUEZ: I wrote that down.

MS. DaPONTE: I would challenge Mr. Authement for cause.

[287] [1126] THE COURT: All right. I'll excuse Mr. Authement for cause.

Ms. Woods?

MR. OLINDE: Acceptable.

MS. DaPONTE: Acceptable.

MR. OLINDE: Note for the record that she's an African American.

MR. VASQUEZ: She's an alternate.

THE COURT: All right. Ms. Fonti?

MR. OLINDE: Accepted.

MS. DaPONTE: Excused.

MR. VASQUEZ: We'll excuse her, Judge.

THE COURT: Okay. And Ms. Ronquille?

MR. OLINDE: She's excused by – Hold on –

MR. WILLIAMS: One excuse each.

MR. VASQUEZ: I'll take Ms. Ronquille.

MR. OLINDE: I'll take Ms. Ronquille.

THE COURT: Ms. Ronquille is on the jury?

MR. WILLIAMS: Yes, sir.

[288] [1127] (Colloquy at bench.)

(The following is taken within the hearing of the prospective jurors.)

THE COURT: All right. The Court would like to thank and excuse everyone except for Ms. Woods and Ms. Ronquille.

All right. Let's swear in the jurors.

(Whereupon, the chosen jurors are sworn to hear the case.)

THE COURT: All right. Would the bailiff please escort the jurors to the jury room?

(Jurors exit Courtroom.)

THE COURT: All right. We've concluded picking the jury; so, everyone else is excused. I believe the jury room is still open downstairs; so, pick up your cards and go downstairs to the jury room and report in.

Thank you very much for coming.

All right. The Court's going to be in a ten-minute recess.

(Recess.)

[289] [1128] CERTIFICATE

I, Kerry B. Westmoreland, Official Court Reporter, in and for the Parish of Jefferson, State of Louisiana do hereby certify that the foregoing two hundred eighty-eight pages (288) pages [sic] taken by me on August 28, 1996, in open court, in the matter entitled State of Louisiana versus Allen Snyder, Cs. No. 95-5114, Division "H" is a true and correct transcript of the proceedings according to the best of my ability and understanding;

That I am not of Counsel, related to Counsel or any of the parties and am in no wise [sic] interested in the outcome of this case.

/s/ Kerry B. Westmoreland
KERRY B. WESTMORELAND, CCR
La. Lic. 87110
Official Court Reporter
24th Judicial District
Parish of Jefferson
State of Louisiana

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

* *

STATE OF LOUISIANA

VS.

ALLEN SNYDER

NO. 95-5114

DIV. "H"

* *

Testimony and proceedings taken in the above numbered and entitled cause, in open court on Friday, August 30th, 1996, before the Honorable Kernan A. Hand, Judge presiding.

[Direct Closing Argument of Assistant District Attorney]

* * *

[189] [1557] MR. OLINDE: Ladies and Gentlemen of the Jury, this will be the last time that you hear from me, and I want to thank you all again for your attention in this matter. It's important to everybody, both sides, and everybody thanks you.

At this point in the trial, I'm going to offer you the compelling reasons of why [190] [1558] the death penalty, the imposition of the death penalty against Allen Snyder is the only appropriate verdict for you to return in this case. And I'm going to start by telling you, by virtue of the fact that each and every one of you, all 12 of you, found Allen Snyder guilty of first degree murder, as a matter of law, since you already have found the aggravating circumstance of specific intent to inflict great bodily harm or intent to kill more than one person, you, as a matter of

law, are entitled to return a recommendation of the death penalty.

Ladies and Gentlemen of the Jury, it's incumbent upon me at this time to show you that the most important person in this case, as I've said from the very beginning, is not Allen Snyder. It's Howard Wilson. And you heard from Howard Wilson's wife and you heard from Howard Wilson's father, about the dramatic impact losing him had upon those families, the family's [sic] sitting right out there, the significant and egregious loss that they sustained in losing their child and the husband. You heard a little bit about the life of Howard Wilson. You learned that he was a church-going person. You learned that he was educated. You learned that he was smart. You learned that he was a good businessman. You learned that he was a caring father. You learned that he left behind a child. You learned that he graduated from school. You learned, [191] [1559] Ladies and Gentlemen, that he was always employed, and he was an extremely hard worker and always provided for his family.

You know the other thing no one in this courtroom during the entire pendency of these proceedings has ever uttered one disparaging remark about Howard Wilson, no one. There's no evidence that Howard Wilson had zero, in fact, no criminal record at all, never been arrested, never been convicted, never had any problems with the law.

When I ask you to think of Howard Wilson as the most important person in this courtroom, I'm asking you to look at his life, the life of the victim in this case, and to evaluate the quality of this man's life because, Ladies and Gentlemen, there is nothing that this man can do to reverse what he's done already. And the question, Ladies

and Gentlemen, is not whether you're going to decide to impose the death penalty or impose life imprisonment. Isn't the question really this: For a man who has committed such an egregious crime that he cannot change, isn't it really a question of whether or not Allen Snyder forfeited his life at the moment he decided to slaughter Howard Wilson and steal his very existence away from him? Didn't he forfeit his life at that moment in time? And so the question, Ladies and Gentlemen, is not what you're going to impose, but is he entitled to get his life back after depriving another [192] [1560] fellow human being of theirs? That's the question you have to decide.

During the penalty phase, Ladies and Gentlemen, you heard a bunch of reasons of why Allen Snyder did this and why Allen Snyder did that, but are any of the questions of why Allen Snyder did what Allen Snyder did, do they mean anything to a man whose body lies six feet under the ground? Does that mean anything to him, why Allen did this and why Allen did that? Is there any possible way that why gives Howard Wilson his life back? The case, Ladies and Gentlemen, when deciding this awesome responsibility that you have, which I submit to you is very straightforward and actually simple in this case, is about individual choice, and it's about individual responsibility, and it's not about blaming everybody else for your problems. That's not what it's about.

Because, Ladies and Gentlemen, none of you chose to be here. Mr. Williams and I didn't choose to be here. Ms. DaPonte and Mr. Vasquez didn't choose to be here for this occasion. We all got here for one reason, one reason only: That man's individual choice to go out and murder. It was his choice for why we're here today, and it's his choice and

it's because of his choice that you have to decide what you have to decide.

I submit to you, Ladies and Gentlemen, that this phase took on a two-track [193] [1561] course. The first track that this phase took on was a very, very familiar thing. It was a track of why everyone else is responsible for Allen Snyder's individual choice. His mother is responsible for leaving. His father is responsible for drinking. His wife's responsible for what she's done. Howard Wilson must have had the knife and he shined it to him. I guess Howard Wilson's responsible for what he did. Isn't there a familiar thread to all of this? "I went over there with a knife just to talk to them. I opened the car door, and my wife's to blame because she was doing something, an adulteress act," which there's no physical evidence of. There is a common theme to every one of these stories that you heard from all of these doctors and from everyone who testified today, and it's all self-serving for why Allen Snyder made his individual choice, every last bit of it, every last bit of it. That's Track Number 1.

The second track, and I guess if you are a human being and you do deprive another human being of their existence and their life, though you can never repay that, in the sense, there's only one way to repay that, isn't the common decency for the family of Howard Wilson remorse, regret, sorrow for one's actions? Perhaps that might take a step in the – having the decision to spare someone's life. Did any witness up here, and you heard they had a lot of witnesses up here that said, [194] [1562] that Allen reported this. Allen reported that. Allen stated this, and Allen stated that. Not once did Allen ever state that he was responsible for this crime that you found him guilty of. Not once did Allen state that he was sorry for killing

Howard Wilson and maiming his wife. Not once did Allen ever choose to admit any remorse to any of the people that were reported things.

In fact, Ladies and Gentlemen, the defense in their presentation of mitigating circumstances was very, very long on excuses for Allen's conduct and very, very long on begging for mercy for Allen's life. But you know what: They were very, very short on giving you reasons of why you should do that. There aren't any. There are absolutely no reasons that were offered to you.

They're asking you, essentially, for a second chance. Why is he deserving of a second chance? They're telling you that Allen's depressed, and you've heard that has nothing to do with violent criminal behavior. I wonder, Ladies and Gentlemen, that someone who is a convicted cocaine distributor, how much depression have they caused to society? How many people that they've given cocaine habits to are depressed now? How much harm has he already done? And he got a second chance. A lot of people go to jail for a long time for that. Got a second chance, got probation. What did he do? Went off like [195] [1563] a time bomb and murdered Howard Wilson, and you saw the scene of that slaughter. That's what happened with that second chance.

Ladies and Gentlemen, though there is no way that Allen Snyder could possibly, possibly pay for his crime for what he's done to Howard Wilson and his wife, the law does allow them to present mitigating circumstances to you, to show you why you should not give him the death penalty. And did they prove any of those? A) The offender has no significant prior history of criminal activity. The man is a convicted, two-count distributor of cocaine. Of

course, he says he was duped into one and never heard about the other one. Someone who distributes cocaine, there's another word for that; it's called being a dope dealer, cocaine dealer. Yes, he's got – I'd say that's significant. That's a significant prior criminal history. That hasn't been proved to you. In fact, the evidence cuts the other way. The offense was committed while the offender was under the influence of extreme mental or emotional disturbance.

Ladies and Gentlemen, the most important aspect of that is the testimony of every psychiatrist who took the stand. Don't take our psychiatrist's word for it; take theirs, too. Dr. Sara Deland, Dr. Hannie and Dr. Robert Davis all agree on one thing, and that is, this bible of psychiatry, the DSM-IV, in no way can [196] [1564] depression, whether it exists or not, ever cause or correlate to violent criminal behavior or murder. And so, there's no causation between his conduct and this mitigating circumstance. That means nothing. The offense was committed while the offender was under the influence or under the domination of another person. And lying in wait by a trailer, with a combat knife that's double-edged and sharp, whose domination was he under? I didn't hear any evidence of that.

The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct. And the hypo that I gave in voir dire about the man whose family had been kidnapped, that would fit right there. Is that the case of this slaughter of one human being and attempted slaughter of another? Is there any moral justification for that? Moral justification. Is this the Baton Rouge case? No. E, at the time of the offense, the capacity of the offender to appreciate the criminality of his conduct or to conform his

conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. Again, we can bring that up with B. All of the psychiatrists agree that even if there is depression, it has absolutely no correlation with violent criminal behavior. That doesn't apply either.

[197] [1565] The youth of the offender at the time of the offense; he's not 15 years old. He's not 16 years old. He's not 18 years old. This is a grown man, and there are a lot of cases when someone's very, very young and may not totally appreciate the consequences of their action. Doesn't the evidence cut completely the opposite way with him? Doesn't his age show you and tell you that this is a man of years who should have known better?

The offender was a principal, whose participation was relatively minor. Well, it's like Mr. Williams told you, the principal argument: Three guys plan an armed robbery, two people stay home, one guy goes in and shoots the teller. Everybody was involved in the crime. Is Allen Snyder the man who stayed home, who just agreed to do something? No. He's the primary actor. He is the one who wielded the murder knife weapon, and committed murder.

G doesn't apply. In fact, again, the evidence completely cuts the other way because he is the only actor in this crime and he commits all phases and parts of it. Any other relevant mitigating circumstance, I haven't heard of any.

I'm going to close with this: Allen Snyder was given a second chance after he distributed cocaine in the community and wreaked havoc upon society, and look what he did with it. Allen Snyder has no way to pay for this crime. There's nothing he [198] [1566] can do to pay for this crime, really, no matter what you decide, and you can't

really do justice in this case, because we can't bring Howard Wilson back, and if you sit here and you try to somehow intellectualize it and balance these lives of Howard Wilson, a man who's never been in trouble before, a man who is willing to accept responsibility for his actions, a man who is able to be a good father and a good human being, and a man who had never, ever had any blemishes on his life, if you weigh his life against the life of Allen Snyder, a man who blames other people for his actions, a man who is not responsible for what happened, and a man who shows absolutely no remorse or sorrow for the death of this person, a man who has wreaked havoc upon his wife through beatings and upon society through dealing cocaine, how can we get back to the principal question of whether or not he deserves to get his life back? How does this scale tip, Ladies and Gentlemen? And I'll tell you what: It tips very, very, very heavily in favor of the only possible verdict in this case.

Ladies and Gentlemen, think about this case. And I'm going to tell you, every time that – Mr. Vasquez is going to get up here in a second – every time he tells you about Allen and his family, you know who you really ought to think about? You ought to think about the victim, the guy who is buried six feet under. Think about [199] [1567] how that applies to Howard Wilson and his family when you get up here and hear those things.

Ladies and Gentlemen, we picked you, Mr. Williams and I, and the defense picked you. We picked you because we all believed, Mr. Williams and I believed that you had the moral courage to do what was right, and we picked you because we believed that you have the moral courage to hold someone responsible for a horrible first degree murder. All of you stated in the voir dire questions that if we

proved our case of first degree murder to you, that you could consider imposing the death penalty. And I'll tell you, Ladies and Gentlemen, there hasn't been one reason offered in court today why you shouldn't, and we ask you to hold true to your voir dire statements, and after you look at everything, that you come back with the only just verdict in this case, and that is, one holding him completely responsible and not partially responsible.

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TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

* *

STATE OF LOUISIANA

VS.

ALLEN SNYDER

NO. 95-5114

DIV. "H"

* *

Testimony and proceedings taken in the above numbered and entitled cause in open court on Friday, August 30, 1996, before the Honorable Kernan A. Hand, Judge presiding.

[Rebuttal Closing Argument of Assistant District Attorney]

* * *

[213] [1581] MR. WILLIAMS: May it please the Court and Counsel, Ladies and Gentlemen of the Jury, I'd like to take the opportunity on behalf of Mr. Olinde and the State to thank you for your participation in this case. I now have the opportunity to do a rebuttal argument. I will be brief. When I conclude my remarks, Judge Hand will read you the law that's applicable in this case. It won't be quite as long as it was yesterday, and then you'll have the opportunity to make a very awesome decision, but I want to remind you, Ladies and Gentlemen, that the decision – That it is a decision that should be based upon the law and the evidence and not upon emotion.

The decision that you will make will have to be decided upon the evidence that you've heard regarding the character and propensities of Allen Snyder, the defendant

in this case. Circumstances that surrounded the killing of Howard Wilson and the attempted murder of Mary Snyder, that's what you'll have to decide. You'll have to weigh that, along with any mitigating circumstances that you think [214] [1582] might exist in this case. Of course, by virtue of your verdict from yesterday, you have already found one aggravating circumstance, and you now have the right, legally, to return the death penalty.

Now, the first thing that I'd like to say, Ladies and Gentlemen, is when you go back and you deliberate, I'd ask you, and I don't think you're going to do this because all of you all during the course of the jury selection process made it very clear that you all could consider the imposition of the death penalty. So I would ask you upon your deliberation, that perhaps now is not the best time to argue the pros and cons of the death penalty. I think you all have agreed that you could consider it, and I think that in this particular case, it is merited. You may go back there when you begin to deliberate the case, and there may be one or more of you who may say, as has been done in the past on many, many occasions, that life in prison, the State Department of Corrections in the State of Louisiana, is a far worse penalty than the death penalty. Well, I'm not so sure that that holds true anymore. I don't think that the Department of Corrections is the kind of place that it used to be where one, an individual was punished. I don't think, and I think all of you all know from your good, common experience, that that's just not the way penitentiaries are anymore. So I would ask those of you who think that [215] [1583] a life imprisonment is a terrible, terrible, terrible sentence, that as Mr. Vasquez says, "For that man over there to wake up everyday in the penitentiary would be a far worse sentence than the death penalty," I ask you

this. I ask you to consider this: Everyday for the rest of Doreena Wilson's life, everyday for the rest of Howard Wilson, Jr.'s father's life, for his brother's and family that are here, they'll wake up – They'll wake up knowing that their son, their husband, their brother, was brutally murdered, and there won't be anything in the world they can do about it. There won't be anything that they could do to cause that memory to go away, nothing.

So when we talk about life, when you talk about how rough life is, how rough life might be for him, let's ask yourselves about life for them. And, Ladies and Gentlemen, let's us, instead of worrying about this killer over here, let's look at the act that he did. How has that affected other people? Let's do that. Instead of, as he has told all of the doctors that everything – As he told the police, he's only worried about himself. Let's look at what his act did to other people.

You heard from his wife, Doreena Wilson. She told you, as best she could muster, the sort of person that Howard Wilson was. She talked about the kind of provider he was for her. He's gone now, [216] [1584] and he was taken away for only one reason. It was a reason – It was the decision that that man over there made all by himself. He didn't call Doreena and check with her to see, have you had enough of Howard, I'm going to check him out. He didn't check with anybody. He made the decision on his own. She had – She had – There was nothing in the world that she could do to stop this from happening, and it happened, and for the rest of her life, for the rest of her life, until she passes away, what happened to her husband is probably going to be something that she thinks about every single day. The one thing that she said that practically drove me to tears, and I bring this up because Mr.

Vasquez mentioned about if you do anything, consider life in prison for Allen Snyder's children.

Well, Ladies and Gentlemen, perhaps it is out of line for me to say this, but I don't consider those three kids his kids anymore. They're Mary's kids. When he did these things, when he brutalized his wife, especially when he brutalized his wife in front of those kids, he certainly, certainly doesn't have any love for those kids. He couldn't have. When I hear that poor lady out there saying that her dead husband's son wants to know when he could play with his daddy, and that poor lady has to tell her son that his daddy's in Heaven, and that he can't come down from Heaven to play with that little boy. All [217] [1585] I can think about is what did you do. And yet, Ladies and Gentlemen, not a word of remorse. That poor little boy. Don't think about him. Think about that poor family. Think about that poor soul out there. Many of you are fathers. Think about that poor man out there who came before you this morning, 14 strangers, and had to tell you that his son was – His family was like one. His son was like his best friend. How many of you all have sons who are your best friends? How many of you all can even fathom the pain that that man endures, is enduring, will endure for the rest of his life because of the selfish, intentional acts of Allen Snyder?

What's the worst thing that's happened to any of you? Well, I can't ask you now. Rhetorically, what's the worst thing that's happened to any of you all? Perhaps a father, a grandfather, a close friend or relative died of cancer or heart disease or was in an accident, or somebody was the victim of a crime. What about the poor people who had relatives on board that plane that was probably shot down over Long Island, New York, and they all died? What y'all

saw that on T.V., didn't you just – Didn't you just think, God, my heart goes out to those poor, poor people who were killed for a senseless act of violence and how empty their lives must be now.

And then, Ladies and Gentlemen, imagine, imagine the family of this poor [218] [1586] man who was brutally murdered for no reason. I mean, this wasn't even a man that got killed during an armed robbery because he resisted. This wasn't a man who was a narcotics dealer who was killed during a narcotics transaction. This wasn't even a tourist that was killed by a whacked-out, full-of-drugs, 15-year-old kid that didn't have a clue what the difference between right and wrong was and wasn't scared of anybody.

Howard Wilson was intentionally, savagely, brutally stabbed to death by that man right there, by that man who left his home in his car armed with a knife, by a man who laid in wait and by a man, who as he sat there lying in wait, had to have made up his mind that I'm going to kill whoever's in that car. And it just so happened that Howard Wilson, as I said yesterday, was in the wrong place at the wrong time.

When you go back and you deliberate, and you start thinking about the victims in this case, the victims in this case are seated right out there, Ladies and Gentlemen, and they, because of his intentional actions, because of his decisions, are going to be victims for every day for the rest of their lives.

Let me speak briefly about the character and the propensities of Allen Snyder. Allen Snyder is not retarded. Allen Snyder has above-average intelligence. Allen Snyder was Honorably [219] [1587] Discharged from the Marine

Corps. Allen Snyder was aware of his actions, knew what he was doing and, Ladies and Gentlemen, he must be held responsible. He must be held responsible for the decision that he made back on the August the 16th of 1995, early in the morning. He must be held responsible. He is a man who is smart enough to make choices in life, and the choices that he has made, it is very obvious, it should be obvious to everybody that sat here and heard this case, the decisions that he made were to have extramarital affair, at least one. The decision that he made was that when he found or perhaps even before, he found that his wife was in the company of another man, that he was going to abuse her. I'm not going to go all through as I did yesterday.

The size of Allen Snyder versus his smaller wife, training, martial arts, the Marine Corps training, which gave him such power over this lady. The kind of character he is, is the kind of character to put – I mean, Ladies and Gentlemen, each one of these instances by themselves, if you think about it, and we're sitting here in a courtroom that's well-lit and it's bright. If you go back and you think hard enough about it, you can transport yourself into these situations where all these violent acts occurred, and each one of them, by themselves, they're terrible. To hit his wife with a hammer, with a [220] [1588] pointed edge. I mean, how many of you all, the ladies, four ladies, and this is rhetorical, I do not want an answer, have ever had your husband pull your arm, or those of you who are not married, had a boyfriend pull your arm behind your back? That act of force itself is a terrible thing toward one that you love, and probably wouldn't be tolerated and shouldn't be. And yet, he took a hammer; he took a baseball bat; he put her head through a wall; he put her head into a

windshield. He secreted in, removing the fuses into her house and stabbed her in the back. This is things that he did, that man did, to the mother of his children, to his wife. No one made him do those things.

Do any of you all, the 12 of you all who are going to decide this case, do any of you all honestly believe that him being depressed is what caused him to do those things? I think it's as clear as it can be. If Allen Snyder couldn't have Mary Snyder, then no one else was going to have her. She became a possession and, Ladies and Gentlemen, I can only suggest to you, and those of you all who have knowledge of domestic abuse, I'll submit to you that Mary Snyder, back then, more so now, is a lady who's probably lost all of her self-esteem that she once had because of the way she was treated by her husband. He mistreated her to the point where she's probably now, the truth be known, [221] [1589] somewhere between a normal person and a zombie, having been beaten by him, having been threatened by him, and then, finally, having been stabbed by him to the point where she had to play like she was dead or he would have killed her. And that tells you about him. That's her husband.

Allen Snyder is a narcotics dealer, was back in 1989. That is relevant evidence, Ladies and Gentlemen. On two occasions, he distributed cocaine. Now, there are probably a lot of you seated there and, once again, I'm not asking for any kind of response, who if I asked you what you felt about people who sold drugs, there might very well be one of you who felt that – And there are a lot of people who feel that people who sell drugs should get the death penalty. We don't need that. All of us know, every single one of us know, that the root – A very large percentage of the problems that we have in this country are due to narcotics. We

don't need people in our society, we don't need people in Jefferson Parish, who sell narcotics. And yet, that's what this man chose to do back in 1989. And you know what? Actually, he did it in St. Charles Parish, and the Judge there gave him a break.

Now, wouldn't you all think and wouldn't you all agree with me, after that very serious brush with the law, and you know what, you know what the penalty for the distribution of cocaine is? It's from [222] [1590] 5 to 30 years at hard labor. A Judge could give somebody who sold the smallest amount of cocaine up to 30 years in the penitentiary. And yet, this man got a break from the Judge in St. Charles, who gave him probation. Wouldn't you think, Ladies and Gentlemen, that a normal person, a person of common sense and common understand, after they went through that brush with the law, would do everything possible to be a better citizen? And yet, what that man chose to do was to abuse his wife and ultimately commit the crimes that he stands here charged with today.

So when you go back and you ask yourselves, you know, what sort of ammunition did we have? What sort of evidence do we have to consider the imposition of the death penalty, you have a person who's already had a chance, a person who committed a very, very, very terrible crime, and that is, distribution of cocaine. Not a person who has no prior significant history of criminal activity.

It's been very clear, and this is the last thing I'm going to say about Allen Snyder, that the kind of person he is, as Mr. Olinde described him in his opening statement, he's egocentric, and he has shown no remorse. More than that, as he stabbed his wife 15 times, put her through what Dr. Harkness described as a near-death experience, as she lay

there gushing blood, as Mary Snyder sat in that seat [223] [1591] right there, he left her there. He left her there to die. And when Detective Labit took the statement from him 12 hours later, you've read the statement, not a word, not in that statement, not a word at any time where you would have heard him, how's my wife? Is she okay? Not a word. Is that because he's depressed or because he's got a far deeper problem?

Brief mention. Mr. Vasquez tried to describe this man as being the man who – And it was 12 hours later when he called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of –

MR. VASQUEZ: Your Honor, I object. I want to approach on this.

THE COURT: Okay. Counsel, come forward.

(Whereupon, the following is taken at the bench, out of the hearing of the jury.)

MR. VASQUEZ: He's going to mention the O.J. Simpson trial.

MR. WILLIAMS: That case –

MR. VASQUEZ: I object to that.

MR. WILLIAMS: Your Honor, based upon what he did in [224] [1592] this case, where he sat for about 12 hours, he huddled and pretended to kill himself, just like O.J. did and just like O.J. got away it. I think that's fair –

MR. VASQUEZ: That's ridiculous.

MR. WILLIAMS: It's a fair comment and those people will decide what weight they want to give to it.

MR. VASQUEZ: Judge, that's –

MR. WILLIAMS: That is as ridiculous as some of the things you said, and I think that's fair comment on something that's common knowledge. And certainly, those people are intelligent enough to give it whatever weight they want to.

THE COURT: I'm going to allow it.

MS. DaPONTE: Note our objection.

MR. VASQUEZ: Please note our objection.

(Whereupon, the following is taken in the hearing of the jury.)

MR. WILLIAMS: The most famous murder case, and all of you all have heard about it, happened in California very, very, very similar to this case. The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, he [225] [1593] got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that's not what that man was thinking about when he called in and claimed that he was going to kill himself?

Ladies and Gentlemen, the death penalty, I'll submit to you, is society, society's self-defense against the kind of crime that was committed in this case. It's the only way that we know to respond to the kind of crime that was committed.

Now, I'm most certainly asking each and every one of you all, the 12 of you who decide this case, to return the

death penalty. I think the evidence is overwhelming and that's the only appropriate penalty in this case. But I'm not going to put a guilt trip on you about that.

What I want you to consider is what's more appropriate. Is it more appropriate for you all to sentence him to spend the rest of his life in jail, and the key word there is life, because he will go to Angola, there's no doubt about that, but he will, after a period of time, I don't know how long that might be – It might be several weeks, it might be several months, it might be several years. He will become acclimated to the prison system, and he will rebuild his life. And it will be different than it is on the outside, there's no question about that, but he'll still have a life. He'll be able to be visited by his family. He'll be able to [226] [1594] make new friends –

MR. VASQUEZ: Your Honor, I'm going to object.

MR. WILLIAMS: – he'll be able to do –

MR. VASQUEZ: Excuse me, Mr. Williams. This is improper argument.

MR. WILLIAMS: Judge, –

MR. VASQUEZ: Lessening the severity of a life sentence is clearly improper argument. That's what Mr. Williams is doing. Please note my objection.

THE COURT: Objection overruled.

MR. WILLIAMS: Those things are obvious to you, Ladies and Gentlemen. If you sentence him to death, he will be transported to Angola. He will await his punishment in a single-person cell on death row, and I think probably every single one of you all know enough about

that to know what all of that involves. He will not be allowed to be in the general population. He will be sitting by himself in a very small cell, with a lot of time to think about what he did, and that's what he deserves.

I find it ironic, at best, and I'm about to sit down, that the only person who came into this court and who begged for the life of Allen Snyder is his lawyer, Caesar Vasquez. You didn't hear [227] [1595] one of his family members ask for that. You didn't hear anybody else ask for that. Ladies and Gentlemen, you heard Mr. Vasquez virtually in the same breath where he begged you to return a verdict of life in prison, to say, "Mary Snyder still goes and brings her kids to Allen's mother, to their grandmother's house to eat." And he made it like for whatever that's worth. Well, I think what that means is, is that Mary probably still loves her mother-in-law, wants her children to be with their grandmother and is trying to deal with this situation as best she can. She can't be condemned for that. That certainly isn't any kind of negative implication.

Ladies and Gentlemen, finally, when you go back, I'm going to ask you – And really, this is the only real way that I truly believe that you can render an appropriate verdict – Is to go back, and you can do that, if you choose, through the photographs which chronicle the scene, the crime scene. It was late at night. It was pitch black. It wasn't light in here, and you just try to recreate the savagery that occurred inside of that car. These photos of Howard Wilson are amongst the worst that could be shown to anybody, anywhere, any jurisdiction. The holes, large, gaping holes, gashes in the body of Howard Wilson indicate the violence of this crime. The position of the wounds, particularly this one that I'm showing to you from State's Exhibit Number 16, [228] [1596] indicate not only the violence that

occurred, but also the senselessness of this killing. Why? Why did that man kill Howard Wilson? Why did he do it? Howard Wilson was not armed. Howard Wilson was not a threat. Surely, Ladies and Gentlemen, that man had enough training, enough ability, that he probably could have killed just about anybody with his bare hands, and yet, he chose to drive that double-edged blade into his back, across his throat, continue to stab him, cut off his thumb, stabbed his own wife, his own wife so many times. The savagery of this murder calls for only one penalty, and that's the death penalty.

A single blow, perhaps, a struggle and ensuing death, perhaps then, life. Perhaps a fistfight and somebody is very seriously injured, we're not even considering that. All of the things that could have happened in this case, but they were all up to him, and he made the decisions that land us here. He made the decision, Ladies and Gentlemen. He made the decision by himself, with no help from no one, with no evidence that he was on any kind of narcotics, with no evidence that he didn't know right from wrong. He made the decision that night to turn this man right here, who'll never hold that child, who'll never hold his wife, whose son will never be able to learn how to play ball from his father, that man made the decision to destroy that family and [229] [1597] they're destroyed; you know that. He might as well have killed that lady seated right out there for the kind of life that she's going to have. He made the decision to turn that man into this right here, only him.

And for that, Ladies and Gentlemen, I ask you on behalf of the families in this case, on behalf of the people of Jefferson Parish, the State of Louisiana, to go back and

deliberate, and to return a verdict, which is our self-defense against this kind of crime, and that's the death penalty. Yesterday, Ladies and Gentlemen, that attorney right there, asked you, begged you, pleaded with you; to return a verdict of manslaughter, which you rejected. Today, this attorney right here, Mr. Vasquez, has come to you and who has pleaded with you, who has begged you, to return a verdict giving his client life in prison. I ask you to reject that. I ask you good people, and I know it's hard work. I know no matter what you think, when you go back there and you're going to discuss whether or not you recommend life or the death penalty, that it's hard work, but it has to be done.

In this case, Ladies and Gentlemen, I'll submit to you that it needs to be done. It must be done. The 12 of you all who have this awesome responsibility, I ask that you exercise that responsibility and you exercise it in such a way that each of you will come back in this [230] [1598] courtroom, and as long as it takes you, you will come back and you will say, Allen Snyder, for the crime that you've committed, for the kind of person that you are, you deserve only one penalty. And I ask you, Ladies and Gentlemen, when you fill out that verdict form, to write down, having found the existence of the below-listed aggravating circumstance, which is that the offender had a specific intent to kill or inflict great bodily harm upon more than one person, that we unanimously recommend the death penalty. I ask you that on behalf of the family of Howard Wilson, and I thank you very much.

* * *

STATE OF LOUISIANA	**NUMBER: 95-5114**
VERSUS	**24TH JUDICIAL DISTRICT COURT**
ALLEN SNYDER	**PARISH OF JEFFERSON STATE OF LOUISIANA**
FILED: 12/4/96	/s/ Faye Guillot **DEPUTY CLERK**

MOTION FOR NEW TRIAL

The defendant, ALLEN SNYDER, through undersigned counsel, moves for a new trial pursuant to Louisiana Code of Criminal Procedure, Article 851, and states the following in justifications:

(1) The verdict is contrary to the law and the evidence;

(2) The court's ruling, on a written motion, or an objection made during the proceeding shows prejudicial error, specifically, the court rejected the defendant's Batson motion made during jury selection resulting in an all-white jury trying the defendant, who is black;

(3) The court erred in failing to continue the trial in order to give defense counsel sufficient time to prepare for the first degree murder, death penalty case;

(4) The court erred in failing to continue the trial in order to give defense counsel sufficient time to develop a defense of insanity;

(5) The ends of justice would be served by the granting of a new trial, both as to the guilt phase and the penalty phase.

Respectfully submitted;

FARMER & BURNS, LTD.

/s/ Marion B. Farmer
MARION B. FARMER
Attorney at Law
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Bar Roll No. 11131

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been forwarded to all counsel of record by placing a copy of same in the U. S. Mail, properly addressed and postage prepaid, on this 12th day of November, 1996.

/s/ Marion B. Farmer
MARION B. FARMER

STATE OF LOUISIANA	NO: 95-5114	DIV. Criminal
VERSUS	24th JUDICIAL DISTRICT COURT	
ALLEN SNYDER	PARISH OF JEFFERSON STATE OF LOUISIANA	
FILED: _____	_____ DEPUTY CLERK	

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL

NOW INTO COURT, through undersigned counsel, comes ALLEN SNYDER, who respectfully represents:

On August 27, 1996, defendant came to trial for first degree murder, after which he was found guilty as charged. Following this verdict, the jury voted to impose the death penalty on defendant. The ends of justice would be served in granting defendant a new trial.

Defendant was represented at trial by the public defender's office. They were appointed to represent defendant some three months before the trial. Under the Louisiana Constitution, defendant is entitled to right to counsel to utilize every advantage the law grants him. *State v. Bodley*, 394 So. 2d 584 (La. 1981) and *State v. Comeaux*, 514 So. 2d 84 (La. 1987). Defense filed two Motions for Continuances which were denied. Because of the inability to properly prepare for the trial or for a defense including a mitigation defense and an insanity defense. Therefore, defendant was denied his full right to counsel.

In addition, defendant was not competent at the time to stand trial. A lunacy hearing was instituted to determine

whether defendant was competent to stand trial. The court appointed doctors found he could assist in his defense but was hard to communicate with since he suffered from depression that had been inadequately treated. The [sic] testified he would be able to better assist in his defense on difference [sic] medications. These new anti-depressant medications would take six weeks before the effects could be utilized; defendant started [t]he medications one week before trial. This is clear and convincing evidence that defendant could not proceed to trial.

This can be compared to the case of *State v. Williams*, 381 So. 2d 439 (La. 1980) where one psychiatrist found defendant was incompetent to stand trial and the other found him to be "moderately impaired". Though the court in that case found defendant to be competent, the Supreme Court reversed stating the evidence pointed to incompetency. In the instant case, both doctors found defendant to be moderately impaired; the evidence points to defendant's incompetency. Therefore, there was prejudicial error by allowing defendant to stand trial in this matter.

Ten days prior to trial, it was necessary for defendant to enter a plea of not guilty by reason of insanity. As a result, two state experts examined defendant. However, this was in the time frame in which he had started new medications which cause extreme instability. This was the mental state in which he was examined which let [sic] to erratic statements give [sic] to these doctors. Despite the fact that defense counsel filed motion to prohibit both doctors from testifying as prejudicial, both doctors testified at the penalty phase of the instant trial. Defendant contends this inflamed the jury which led to the death penalty. Pursuant to La. C.Cr. P. Art. 851, an "injustice has been done".

During the voir dire on the matter, the State issued strikes on all jurors that were Afro-American. All jurors had answered acceptable to the State's questions and the state did not give "racially neutral" reasons for their strikes. When all black jurors are stricken by the State and defendant is tried by an all white jury, there is a sufficient showing of purposeful discrimination justifying the State t [sic] provide "racially neutral" reasons for the strikes. *State v. Collier*, 553 So. 2d 815 (La. 1989). If such reasons are not given or are not adequate, this is a violation under La.C.Cr. P. Art. 795 and *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed. 2d 69 (1986). Therefore, a new trial should be granted.

IN CONCLUSION, in light of the above, defendant prays that the ends of justice would be served in granting defendant a new trial.

Respectfully submitted,
FARMER & BURNS, LTD.

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STATE OF LOUISIANA **NO. 95-5114**

VERSUS **24TH JUDICIAL DISTRICT COURT**

ALLEN SNYDER **PARISH OF JEFFERSON**

FILED:_____ **_____**

DEPUTY CLERK

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL

(Filed Aug. 20, 1997)

NOW INTO COURT, through undersigned counsel, comes ALLEN SNYDER, who respectfully supplements his memorandum in support of his Motion for New Trial as follows:

Defendant's Motion for New Trial, filed pursuant to La. C.Cr.P. art. 851, asserts the following grounds for relief: (1) that the verdict is contrary to the law and evidence; (2) that the court's ruling on both written motions, and objections made during the proceedings, show prejudicial error, including a *Batson* motion made during voir dire but now specifically supplemented to include other court rulings; (3) that the court erred in failing to continue the trial to allow defense counsel time to prepare; (4) that the court erred in failing to continue the trial to give defense counsel sufficient time to develop a defense of insanity, now specifically supplemented to include the defense's inability to communicate with the defendant at trial; and (5) that the ends of justice would be served by the granting of a new trial, both as to the guilt phase and the penalty phase. While a trial court has much discretion in ruling on a motion for new trial, this discretion may not

be exercised arbitrarily or to achieve an unjust judgment. *State v. Hammons,* 597 So.2d 990, 995 (La. 1992).

Denial of Continuances

Defendant was represented at trial by the public defender's office. The public defender's office received its appointment to represent the defendant on May 3, 1996, with a trial date on a charge of first degree murder set for August 27, 1996. Prior to that time, the defendant was represented by Dale Cannizzaro, who withdrew from the case for medical reasons. Mr. Cannizzaro failed to file any pretrial motions in this case.

On August 16, 1996, trial counsel filed a motion to continue the trial. The motion asserted that, although the defendant had been found competent to assist his defense at trial, the defendant's depression had not been properly treated and a recommended dosage of anti-depressant medication would not have enough time before trial to remedy the defendant's unfocused, tangential, and circumstantial ideation, which made communication with the defendant difficult. Defense counsel requested a continuance of five weeks, the recommended time at which the defendant would have the full benefit of the anti-depressant medication. A second motion for continuance was also filed, asserting that there had been insufficient time to prepare mitigation evidence for the penalty phase, if there was one, and that one of the defendant's mental health experts was unable to complete testing due to the time constraints. At a hearing held August 20, 1996, both of these motions for continuance were denied. 8/20/96 Transcript, p. 4-12. At the hearing, a third motion for continuance was urged, this time predicated on the fact

that one of the defendant's mental health experts was unable to attend the trial and would be out of town until September 4, 1996. Continuance on this basis was also denied. 8/20/96 Transcript, p. 12-14.

Thereafter, defense counsel filed a motion seeking to give *in camera* testimony regarding the defendant's inability to assist his counsel and another motion for continuance asserting counsel's inability to properly prepare a mitigation defense due to time constraints and prior work commitments which would leave only four weeks to prepare for the defendant's trial. These motions were taken up immediately prior to jury selection. 8/27/96 Transcript, p. 9. Defense counsel in charge of the guilt phase of trial, Graham daPonte, asserted for the record that she felt her assistance had been ineffective due to her inability to communicate with the defendant. The trial court denied the motion and denied defense counsel's request to make an *in camera* sworn statement. 8/27/96 Transcript, p. 9-15. The defense attorney in charge of the penalty phase of trial, Caesar Vasquez, also argued that he had had insufficient time to prepare evidence in mitigation. Vasquez had a murder trial which occupied most of the time between the appointment of the public defender's office and the start of this trial. Therefore, Vasquez had approximately four weeks to prepare for the defendant's penalty phase. Due to the distances involved in contacting persons who would supply mitigating evidence, defense counsel argued he would be ineffective in the penalty phase of trial, if one occurred. The trial court denied the motion for continuance. 8/27/96 Transcript, p. 18-20.

Whether a continuance is granted is within the wide discretion of the trial court which will not be disturbed absent a clear abuse of discretion. *State v. Martin,*

93-0285, p. 11 (La. 10/17/94), 645 So.2d 190, 197, *cert. denied,* 115 S.Ct. 2252, 132 L.Ed.2d 260 (1995); *State v. Bourque,* 622 So.2d 198, 224 (La. 1993), *rev'd on other grounds, State v. Comeaux,* 93-2729, p. 9 (La. 7/1/97), ___ So.2d ___. Reviewing courts generally decline to reverse a conviction based on the denial of a motion for continuance unless the defendant can show specific prejudice which resulted from the denial. *Bourque, supra.* Each case is determined on a fact-specific basis. *Id.* Specific prejudice was present here.

In order to fully understand the prejudice suffered by defendant, a brief recitation of the pertinent facts must be given. Dr. Sarah DeLand, a forensic psychiatrist, evaluated the defendant on 7/26/96 and 8/12/96 and determined that the defendant was suffering from a significant and major depression over many months which most likely contributed to his behavior in the months leading up to his arrest. Due to depressive symptoms exhibited by the defendant while incarcerated, the defendant was prescribed the antidepressant medication Sinequan. Pursuant to court order, mental health professionals, Dr. Barbara McDermott and Dr. Debra DePrato of the Jefferson Parish Human Services Authority Forensic Services, evaluated the defendant on August 1, 1996, for his competence to stand trial. They determined that the defendant had difficulty focusing on questions asked of him and that he became mildly circumstantial (giving too much detail) and tangential (going off on tangents). They noted the defendant would benefit by a change in antidepressant medication from Sinequan to Prozac or Zoloft. Dr. Richard Richoux, the defendant's attending psychiatrist at the Jefferson Parish Correctional Center, wrote on August 19, 1996, to inform the court that the defendant's medication

had been changed to Prozac effective August 16, 1996. Dr. Richoux stated that it would take approximately six weeks for the defendant to attain the maximum therapeutic benefits of the Prozac. Dr. Richoux informed the court that the change in medication was necessary because "Mr. Snyder continues to display severe depressive symptoms that may interfere with his ability to assist his attorney."

On August 20, 1996, just seven days before trial, the defendant, through his counsel, changed his plea to Not Guilty and Not Guilty by Reason of Insanity. In the week remaining, the defendant was evaluated by two clinical psychologists, Dr. Elaine Salzer (on behalf of defense counsel) and Dr. Thomas Hannie (on behalf of the state) and by Dr. Robert Davis (on behalf of the state), a psychiatrist.

At trial, defense counsel conceded in her opening statement that the defendant killed Howard Wilson and injured Mary Snyder. Vol. 1, p. 18.[1] The only defense question left for the jury, then, was whether the defendant's culpability was affected by his mental state at the time of the commission of the crime (an insanity defense), or whether he had committed the offense in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control or reflection (the lesser-included offense of manslaughter). In Louisiana, a defendant is presumed sane at the time of the offense. La. R.S. 15:432. To rebut this presumption, the defendant must present evidence to

[1] The transcript of trial proceedings is in three volumes. Vol. 1 contains the trial proceedings of August 28, 1996; Vol. 2 contains the trial proceedings of August 29, 1996; and Vol. 3 contains the trial proceedings of August 30, 1996.

prove by a preponderance that he was not sane. La. C.Cr.P. art. 652; *State v. Silman,* 95-0154 p. 7 (La. 11/27/95), 663 So.2d 27, 32. It was up to defense counsel, therefore, to present evidence of insanity at the time of the commission of the offense or to show sufficient provocation that would deprive a person of self-control and would cause them to act in a sudden passion.

Both the time constraints that appointed counsel acted under, and the mental health problems of the defendant, combined to destroy the defendant's Sixth Amendment right to reasonably competent counsel in the guilt phase of trial. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defense counsel was appointed with less than four months to prepare and investigate a first degree murder charge. Although a six week period has been found not to be an abuse of discretion, that finding was premised on the fact that extensive pretrial pleadings and investigation were done. *See State v. Martin,* p. 9, 645 So.2d at 196. That was not the case here. No pretrial motions were filed before the public defender's office was appointed.

Investigation was further hampered by the defendant's mental health problems. Defense counsel's inability to communicate effectively with the defendant was verified when court-appointed mental health experts Dr. McDermott and Dr. DePrato noted his difficulty focusing on questions asked of him. Although they ultimately concluded the defendant was able to stand trial and assist in his defense, they recommended a change in antidepressant medication. Despite the doctors' ultimate fording of competence, the record supports the defendant's inability to communicate with his counsel. *See State v. Williams,* 381 So.2d 439 (La. 1980) (Louisiana Supreme Court reversed

finding of competence where one psychiatrist found defendant incompetent and another found the defendant "moderately impaired"). The prison psychiatrist, Dr. Richoux, changed the defendant's medication for fear that his severe depressive symptoms may interfere with his ability to assist his attorney. The new medication, Prozac, was administered starting August 16, 1996.

Considering the defendant's current mental health problems, and aware of the facts of the defendant's arrest when he was found by police called out to investigate a possible suicide, the defendant found curled in a fetal position with a "siege" mentality, defense counsel changed the defendant's plea to investigate the possibility of an insanity defense. Thereafter the defendant was evaluated by Dr. Salzer, who noted the defendant had been on Prozac for only one week and that he was not yet stabilized on this medication. Dr. Salzer noted the defendant's confused thinking and that he became somewhat pressured and obsessive when addressing events related to his wife. He could not distinguish the relevant from the irrelevant. It was in this state that the defendant was evaluated by the state's mental health experts, Dr. Davis and Dr. Hannie. For the first time, the defendant stated to the state's experts that, prior to the murder, he saw his wife engaging in a sexual act with Howard Wilson in Wilson's car and that his actions were in response to seeing this act. *See Vol. 3, p. 172, 179.*

This fact, if believed, could have served as additional provocation necessary to deprive an average person of his self-control and could have served as the focus of the defense's theory of manslaughter. The problem with this assertion, however, was that the defendant disclosed it a year after his arrest and under circumstances of mental,

instability. Under the circumstances, defense counsel could not evaluate the truth of the assertion. Clearly, a delay was necessary both to investigate this new evidence in support of the manslaughter defense, and to allow the defendant to get on a more stable mental health footing.

Because no continuance was granted, the defense was hampered in presenting its manslaughter defense. Due to the defendant's mental instability, which included difficulty in focusing on questions and answering them in a coherent manner, he did not testify. The defendant was the *only* person who would have presented the evidence that Mary Snyder may have been engaged in a sexual act with Howard Wilson in Wilson's car immediately prior to the defendant's approach.

Instead, due to the lack of time, defense counsel never got a firm grasp on a coherent defense. She half-heartedly pursued the manslaughter defense. When the prosecutor questioned one of the first officers on the scene and elicited the information that both victims were fully clothed, and that he did not see any zippers undone, Vol. 1, p. 32, defense counsel extracted the information that the officer did not cheek for open zippers. Vol. 1, p. 33. However, nowhere in her cross-examination of Mary Snyder did defense counsel ask if she and Howard Wilson were engaged in a sexual act prior to the defendant's approach to Wilson's car. The prosecutor asked Mary that question on direct examination and obtained her denial. Defense counsel only had Mary reiterate that she had just met Howard Wilson, had agreed to a late night date with him, and was making a date with him for the weekend. Vol. 2, p. 51, 55-69. Defense counsel asked no questions of witness Gwen Williams. Vol. 1, p. 101.

Defense counsel entirely abandoned the insanity defense. Despite the fact that she had reports from two mental health experts that the defendant suffered a major depressive episode prior to the crime, she failed to present this evidence in the guilt phase of trial. Dr. Salzer's report concluded that the defendant was in a major depressive episode at least by April 1995. She noted the considerable stress he experienced by his suspicions, and then the confirmation, that his wife was engaged in extramarital affairs. Dr. DeLand reported that the defendant was suffering from significant depression over many months which most likely contributed to his behavior in the months leading up to his arrest.

Although the prosecution made the point at trial during the penalty phase that depression alone does not cause violent criminal behavior, Vol. 3, p. 132, the evidence that defense counsel had in her possession was evidence of some mental disease or defect which had affected the defendant's actions. Most significant, Dr. DeLand's opinion was that the instances of spousal abuse, which were relied on so heavily by the prosecutor in showing intent, did not begin until the defendant started suffering from major depression caused by his wife's infidelity. Vol. 3, p. 122. Even considering the handicap of not having the defendant stable enough to testify, defense counsel still had the reports of these experts, the fact that the defendant was on antidepressant medication, Mary Snyder's testimony of the defendant's jealous and obsessive behavior, his constant calls to her beeper on the night of the crime, and his discovery of her in a car with a man with whom she was contemplating a dating relationship, to argue that the defendant was suffering from a mental disease or defect which caused him to act as he did. Defense counsel even

had the defendant's own statement to police in which he stated that he was "out of control" during the commission of the crime and that he had "snapped." Instead, defense counsel introduced no evidence in the guilt phase of trial, stated in closing argument that she had no evidence of insanity and asked the jury to completely disregard that defense. Vol. 2, p. 125, 139.

Defense counsel did not introduce any evidence of the defendant's mental state until the penalty phase of trial, when the testimony of Dr. DeLand was adduced and the report of Dr. Salzer was proffered. While it seems clear that defense counsel was offering this evidence to show the mitigating circumstance that the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance, or as just another relevant mitigating circumstance, the evidence came too late. La. C.Cr.P. art. 905.5(b) and (h). Even if the jury had not fully embraced an insanity defense which would negate culpability for the crime, defense counsel seriously misjudged the evidence by failing to present anything of the defendant's mental state in the guilt phase. By waiting to introduce mental health evidence in the penalty phase only, the state was able to argue that this evidence was only a last ditch attempt to save the defendant's life, rather than an integral part of the defense. The state was also able to make the defendant's new characterization of the crime, that he found his wife engaged in a sexual act with Wilson, look like a last ditch effort.

Had a delay been granted to allow the defendant's medication to take full effect, two important aspects of the defense's case would have been resolved. Either the defendant could have taken the stand and attested to the truth of his statements or he would not have made the

contradictory statements in the first place because he would not have been evaluated while in an unstable condition.

The lack of time and the difficulties of communicating with the defendant led to defense counsel presenting an incoherent defense. Instead of fully pursuing either a manslaughter or insanity defense to the first degree murder charge, defense counsel half-heartedly attempted one and abandoned the other. The defense that was presented does not rise to the level of reasonably competent counsel guaranteed by the Sixth Amendment. The trial court abused its discretion in failing to grant a continuance both on the grounds that defense counsel did not have adequate time to prepare for trial and on the ground that the defendant needed time to become more stable and communicative on his antidepressant medication. The failure to grant the motions for continuance prejudiced the defendant's right to a fair trial by forcing him to go to trial with constitutionally inadequate counsel. For this reason, he is entitled to a new trial.

Rulings on Motions

Batson claim

The trial court erred in failing to find that an equal protection violation occurred when the prosecutor exercised his peremptory challenges to exclude prospective jurors on the basis of race in violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *See State v. Tart,* 93-0772, p. 14-18 (La. 2/9/96), 672 So.2d 116, 140-141, *cert. denied,* 117 S.Ct. 310, 136 L.Ed.2d 227 (1996). *Batson* set forth a three-step analysis to determine

whether prospective jurors' constitutional rights have been infringed by impermissible discriminatory practices.

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

State v. Green, 94-0887, p. 23 (La. 5/22/95), 655 So.2d 272, 287, citing *Hernandez v. New York,* 500 U.S. 352, 358-359, 111 S.Ct. 1859, 1865-66, 114 L.Ed.2d 395 (1991); *see* La. C.Cr.P. art. 795(C). Because a trial judge's findings will be based on credibility determinations, great deference should be accorded to the trial judge's decisions. *State v. Collier,* 553 So.2d 815, 818 (La. 1989).

In order to demonstrate a prima facie case of purposeful discrimination, a

> defendant must establish that he is a member of a cognizable racial group, that the prosecutor has exercised his peremptory challenges to remove other members of that race from the jury, and that these facts, along with the other relevant circumstances, raise an inference that the prosecutor used his peremptory challenges to exclude the veniremen from the jury on account of their race.

Collier, 553 So.2d at 817.

In this case the defendant is African-American. The prosecutor used five of his peremptory challenges to

remove African-Americans from the jury, resulting in an all-white jury. Although the prosecutor allowed one African-American prospective juror to remain on the jury panel after the first day of voir dire, the prosecutor exercised a "back-strike" on the second day of voir dire to remove this juror.

The record shows that Jeffrey Brooks, an African-American student at Southern University, presented himself before the trial court as someone who had a specific problem with his prospective jury service. His major required him to student teach in this, his last, semester in order to graduate. 8/27/96 Transcript, p. 74-75. The trial court's law clerk called the university dean who stated that, as long as Brooks could make up his time teaching, there was no problem with Brooks finishing his course requirements necessary for graduation. Brooks was satisfied with this answer to his problem. *Id.*, p. 89-90. Thereafter, Brooks was called on a panel and questioned by the prosecutor and defense attorney. *Id.*, p. 152-153.

During questioning, Brooks stated he would listen to the evidence (*id.*, p. 190), would be able to return a guilty verdict if the state proved its case beyond a reasonable doubt (*id.*, p. 200), would weigh the evidence he heard (*id.*, p. 221), could presume the defendant innocent and would not necessarily take a police officer's word over the defendant's. *Id.*, p. 220, 230. He thought it fair that the state had to prove its case and understood the burdens of proof in the presentation of an insanity defense. *Id.*, p. 231, 233-234. He had had dealings with persons who had mental illness through his teaching and understood the defendant did not have to take the stand and why he might not. *Id.*, p. 237, 242. Brooks was accepted as a juror from the first panel questioned. *Id.*, p. 276.

Greg Scott, an African-American in a subsequent panel, stated he could consider imposition of both the death penalty and a life sentence. He could consider an insanity plea. *Id.*, p. 324, 342, 366. He could consider evidence of domestic abuse offered only to prove motive and not as an indication that the defendant had committed the crime charged. *Id.*, p. 348-349. Although Scott stated he would take the stand if he were on trial, he could understand this decision was counsel's and would not hold the decision against the defendant. *Id.*, p. 356-357. Scott could consider manslaughter as a verdict if that is what the evidence showed and would follow the law. *Id.*, p. 361-362. The state exercised a peremptory challenge against Scott. Defense counsel noted that Scott was an African-American but was not "asking for anything." *Id.*, p. 369.

African-Americans Thomas Hawkins, Jr. and Elaine Scott were in the same panel called on the second day of voir dire. 8/28/96 Transcript, p. 5. Hawkins stated he could consider both the death penalty and life imprisonment. *Id.*, p. 9, 17. Although he initially had trouble understanding the burdens of proof in an insanity defense, he had no trouble considering insanity as a viable defense after defense counsel's explanation of the law. *Id.*, p. 23, 35-36. Although he had friends who were police officers in Jefferson Parish, he would not automatically believe a police officer over the defendant. *Id.*, p. 37-38. He stated he would not hold the decision against the defendant if he did not testify. *Id.*, p. 47. He stated he would seriously consider all aspects of the case. *Id.*, p. 51.

Elaine Scott thought she could consider imposing the death penalty and could consider life imprisonment. *Id.*, p. 13, 21. She could listen to evidence of insanity and accept or reject it. *Id.*, p. 26-27. She understood that the

defendant did not have to take the stand, could believe that even a police officer could lie on the stand, and could consider evidence of manslaughter if it were presented. *Id.*, p. 40, 45, 50. She, too, would seriously consider all aspects of the case. *Id.*, p. 51-52.

The state exercised a peremptory challenge against Hawkins. Again, the defense noted that Hawkins was an African-American juror but did not object. *Id.*, p. 62. However, when the prosecutor also peremptorily challenged Elaine Scott, defense counsel argued there was now a pattern of strikes against members of a distinct race and asked for a race-neutral reason. The following exchange took place:

DA #1: For Ms. Scott, the reason is is I observed she was very weak on her ability to consider the imposition of the death penalty. Her words, exactly – I wrote it down, that she thinks she could, and that's the reason for our challenge.

DA#2: And she was very – My notes indicate she was very positive on when I said about a life sentence, she was very positive on her reason – Her agreement that she could do that. It's for that reason –

DEFENSE: You know, the law is clear. If I were doing the same thing, they'd be up here holding me to the same standard. This lady indicated that she could consider both. She was honest about it. She also said she could consider the death penalty. She was not hiding anything. She knows how to get off of this jury if she wants to, either way, and she

> could have done that. She's kept an open mind, and that's what we're looking for.
>
> 8/28/96 Transcript, p. 63-64.

The trial judge allowed the peremptory challenge. *Id.*, p. 63-64.

A subsequent panel contained Loretta Walker, another African-American. Walker initially stated she could not consider the death penalty but stated it was possible that there would be facts to change her mind. *Id.*, p. 70. The reason she could not state with certainty her death penalty views was that she did not know the circumstances of the case. *Id.*, p. 77. After explanation of the law and further hypotheticals, Walker stated she could suspend her views on the death penalty, based on a religious belief, if the defendant had done something very bad, like killing a child. *Id.*, p. 81-82. She stated she would not vote guilty automatically if there was evidence of domestic abuse and could consider manslaughter evidence and a not guilty plea. *Id.*, p. 104, 107, 108.

During the bench conference discussing the attorney's peremptory challenges for this panel, the prosecutor indicated the state was backstriking Brooks, who was accepted in the first panel. *Id.*, p. 114. After noting that Brooks was the only African-American currently seated on the jury panel, defense counsel called for the state to provide a racially neutral reason for the backstrike. *Id.*, p. 115. The prosecutor stated he had three reasons but only delineated two: 1) that Brooks had looked nervous, and 2) that Brooks' concern over missing class might make him return a lesser verdict. *Id.*, p. 115. Defense counsel pointed out that Brooks' concern over missing class had been

resolved to his satisfaction the day before after the court talked to the school's dean:

DEFENSE: His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school and whoever it was and the Dean said that wouldn't be a problem. He was told that this would go through the weekend, and he expressed that that was his only concern, that he didn't have any other problems.

As far as him looking nervous, hell everybody out here looks nervous. I'm nervous.

8/28/96 Transcript, p. 116-117.

After the trial court allowed the challenge, defense counsel stated for the record:

DEFENSE: Your Honor, Mr. Brooks was the first African American chosen. The State subsequently proceeded to cut, at this point, it's either three or four and the record will reflect which it is, and the State has now gone back and cut the only African American that they chose. So that that needs to be on the record.

8/28/96 Transcript, p. 117.

The prosecutor then exercised a peremptory challenge to Loretta Walker, even after noting that he had rehabilitated her. *Id.,* p. 119. When defense counsel noted that Walker was another African American struck by the state and asked for a race neutral reason, the prosecutor stated:

DA#1: The reason is very obvious that at first she said she could not do the death penalty for a long-standing, and then she said under a limited circumstance if he killed a child, she

could do it. We don't have any evidence that this man killed a child, so.

DEFENSE: It doesn't matter, Judge. That's not what the law is, and [DA #1] asked me earlier for some cases.

DA#2: There's no need to argue this.

DEFENSE: State vs. Robinson, State vs. Comeaux. I have the books right there.

DA#1: But that's irrelevant right now.

DEFENSE: Well, it's perfect when you need it. 8/28/96 Transcript, p. 119.

The trial court accepted the peremptory challenge to Walker. *Id.*, p. 120. The defendant argues that the circumstances raised an inference that the prosecutor impermissibly used his peremptory challenges to exclude venirepersons from the jury on account of their race.

In determining whether a defendant has established the requisite prima facie case, the trial judge must consider

> any pattern of strikes by a prosecutor against members of a suspect class, statements or actions of the prosecutor which support an inference that the exercise of peremptory strikes was motivated by impermissible considerations, the composition of the venire and of the jury finally empaneled, and any other disparate impact upon the suspect class which is alleged to be the victim of purposeful discrimination.

Green, p. 24, 655 So.2d at 288.

The record shows that the prosecutor used peremptory challenges to strike every African American called as a prospective juror who survived cause challenges. This

MR. AFRICH: I'm willing to consider all of the evidence.

MR. VASQUEZ: Ms. Savoie?

MS. SAVOIE: It depends on the case.

MR. VASQUEZ: Okay. Can you give me an example? I know Ms. DaPonte was picking on you, an example of a case where perhaps – a first degree murder where perhaps the death penalty is not appropriate?

MS. SAVOIE: No, not right now.

MR. VASQUEZ: Okay.

Ms. Dyess?

MS. DYESS: Uh-huh (affirmative reply).

MR. VASQUEZ: Same question to you: Are there some cases of first degree murder where perhaps [110] [949] the death penalty is not appropriate?

MS. DYESS: Sure.

MR. VASQUEZ: Heard of cases like that before?

MS. DYESS: Yes.

MR. VASQUEZ: Okay.

Mr. Blum?

MR. BLUM: Yes.

MR. VASQUEZ: Okay.

Ms. Stine, you indicated in response to Mr. Williams' questioning that you could consider mitigating circumstances

in determining life versus death. Am I correct in that assessment?

MS. STINE: Yes.

MR. VASQUEZ: Can you give me some examples, perhaps, of some mitigating circumstances that you would – That would, you know, that you would consider in considering life imprisonment?

MS. STINE: I don't know a lot on the law, so I'm not –

MR. VASQUEZ: Okay.

MS. STINE: – you know, – actually giving you [111] [950] an example.

MR. VASQUEZ: Do you understand that the law allows us to present any relevant mitigating circumstances, and what is – The determination of relevance comes from the Judge. The Judge will determine what is relevant and what isn't but the law allows us to present that.

Let's assume that we don't present any mitigating circumstances. There's always that concept of mercy, or perhaps it just doesn't feel right in a particular case, that is, the death penalty. Can you keep an open mind to that?

MS. STINE: Yes, I could.

MR. VASQUEZ: Okay. You could consider the concept of mercy?

MS. STINE: Yes.

MR. VASQUEZ: Mr. Wolfe, same sort of question to you: Let's assume I don't have any mitigating circumstances

to present to you, and all I can do is stand up here and argue to spare Mr. Snyder's life. If I don't present any mitigating circumstances to you, can you consider life imprisonment as well as the death penalty?

MR. WOLFE: I don't believe. I think you'd have to have some reason to do it.

[112] [951] MR. VASQUEZ: I would have to present some sort of evidence to you is what you're saying?

MR. WOLFE: Yes.

MR. VASQUEZ: Mr. Sinceno, is it?

MR. SINCENO: Yes.

MR. VASQUEZ: You heard what Ms. Walker, I believe, said that there are some cases where the death penalty may be appropriate. I understand and I appreciate your sharing your religious beliefs with us. Can you envision any sort of circumstance where you might apply the death penalty?

MR. SINCENO: No.

MR. VASQUEZ: There's nothing that could come in this courtroom where –

MR. SINCENO: No.

MR. VASQUEZ: Fair enough.

These attorneys asked all the questions. They stole all my thunder; so, I have nothing else. Thank you all very much.

MR. WILLIAMS: Judge, I'd like the opportunity to ask Mr. Wolfe just a couple of questions, traverse him on a response. Thank you.

[113] [952] Mr. Wolfe, the last thing Mr. Vasquez asked you was if they don't put on any evidence, could you consider life imprisonment?

MR. WOLFE: Yes.

MR. WILLIAMS: Okay. Okay to the last one. That takes care of this.

(The following is taken outside the hearing of the hearing of prospective jurors.)

THE COURT: All right. Challenges for cause?

MR. WILLIAMS: From the State, Mr. Simoneaux said he could not impose the death penalty.

THE COURT: I'm going to excuse Mr. Simoneaux for cause.

MR. VASQUEZ: Same with this one.

MR. WILLIAMS: Mr. Sinceno could not impose the death penalty.

THE COURT: All right. I'm going to excuse Mr. Sinceno.

MR. WILLIAMS: That's all my cause.

MS. DaPONTE: By the defense, Mr. Blum could not consider the insanity defense.

MR. WILLIAMS: No objection.

[114] [953] THE COURT: Okay. We'll excuse Mr. Blum.

MS. DaPONTE: Ms. Simoneaux would find him guilty just on the domestic violence evidence.

MR. WILLIAMS: No objection.

MS. DaPONTE: Ms. Hernandez could not consider life imprisonment.

MR. WILLIAMS: No objection.

THE COURT: Excuse Ms. Hernandez.

MS. DaPONTE: Mr. Cantrelle could not consider life imprisonment.

THE COURT: Excuse Mr. Cantrelle.

MR. WILLIAMS: No objection.

MS. DaPONTE: Mr. Slaney could not consider life imprisonment.

MR. WILLIAMS: No objection.

THE COURT: Excuse Mr. Slaney.

Okay. Go ahead, Mr. Williams.

MR. WILLIAMS: Okay. First, we're backstriking Mr. Brooks.

MR. VASQUEZ: Judge, we need to get our chart.

[115] [954] MS. DaPONTE: Hang on just a second.

MR. WILLIAMS: Mr. Brooks, first panel.

Tell me if I'm right. We've each got six peremptories, and there's eight jurors selected, correct?

THE LAW CLERK: Correct.

MS. DaPONTE: Judge, Mr. Brooks is an African-American, and I would ask the State to provide a racially neutral reason for their backstrike.

MR. WILLIAMS: I will provide three. I thought about it last night. Number 1, the main reason is that he looked very nervous to me throughout the questioning. Number 2, he's one of the fellows that came up at the beginning and said he was going to miss class. He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase. Those are my two reasons.

MR. VASQUEZ: Do you want me to respond or do you want –

MS. DaPONTE: Judge, I think there's –

MR. WILLIAMS: There's nothing to respond to.

[116] [955] MS. DaPONTE: Yeah, I don't think there is, either –

MR. WILLIAMS: It's either is or there isn't.

MS. DaPONTE: – but I would – No, that's all. I would just say that if he wants to go home early, he's got to come back with the death penalty.

MR. WILLIAMS: No, I think that's –

MR. VASQUEZ: That's not relevant, anyway.

MR. WILLIAMS: The hell it isn't relevant. It's happened to me before –

MR. VASQUEZ: That was –

MR. WILLIAMS: – where jurors – If this case goes to the jury on Friday and one of them gets back there and gets smart and thinks that if they come back guilty of second degree murder, they won't have to do a penalty phase. I guarantee that's a very real concern to –

MR. VASQUEZ: I was talking to Ms. DaPonte, not to you, and I was referring to something else.

His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school and whoever it [117] [956] was and the Dean said that wouldn't be a problem. He was told that this would go through the weekend, and he expressed that that was his only concern, that he didn't have any other problems.

As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous.

MR. OLINDE: Judge, it's –

MR. VASQUEZ: Judge, that's – You know.

MR. OLINDE: – a question of this: It's a peremptory challenge. We need 12 out of 12 people. Mr. Brooks was very uncertain and very nervous looking and –

THE COURT: All right. I'm going the allow the challenge. I'm going to allow the challenge.

MS. DaPONTE: And, Judge, can I – I just need to make the record.

Your Honor, Mr. Brooks was the first African American chosen. The State subsequently proceeded to cut, at this point; it's either three or four and the record will reflect which it is, and the State has now gone back and cut the only African American that they chose. So that that needs to be on the record.

MR. VASQUEZ: Please note our objection.

[118] [957] MR. WILLIAMS: Judge, Mr. Africh is acceptable by the State.

MS. DaPONTE: He's accepted by the Defense.

MR. VASQUEZ: That's Juror 6 now?

MR. WILLIAMS: Eight.

MR. VASQUEZ: I'm sorry.

MR. OLINDE: Ms. Savoie is accepted by the State.

MS. DaPONTE: She's accepted.

MR. WILLIAMS: Ms. Dyess is accepted by the State.

MS. DaPONTE: She's excused.

MR. WILLIAMS: Mr. Wolfe is accepted by the State.

MS. DaPONTE: He's acceptable by the Defense.

MR. WILLIAMS: Ms. Stine is accepted by the State.

MS. DaPONTE: She's excused.

MR. WILLIAMS: I had a feeling.

THE COURT: What happened to Ms. Walker?

MR. WILLIAMS: Oh, Ms. Walker we passed over her.

MS. DaPONTE: [119] [958] Oh, I'm sorry.

MR. WILLIAMS: We excuse Ms. Walker.

MR. VASQUEZ: No, she was moved out, wasn't she?

No, I'm sorry. She was rehabilitated.

MR. WILLIAMS: She was rehabilitated by me.

MS. DaPONTE: Judge, I would just note for the record that Ms. Walker is an African American, and I would ask for a race neutral reason.

MR. WILLIAMS: The reason is very obvious that at first she said she could not do the death penalty for a long-standing, and then she said under a limited circumstance if he killed a child, she could do it. We don't have any evidence that this man killed a child, so.

MR. VASQUEZ: It doesn't matter, Judge. That's not what the law is, and Mr. Williams asked me earlier for some cases.

MR. OLINDE: There's no need to argue this.

MR. VASQUEZ: State vs. Robinson, State vs. Comeaux. I have the books right there.

MR. WILLIAMS: But that's irrelevant right now.

MR. VASQUEZ: Well, it's perfect when you need it.

[120] [959] THE COURT: All right. The Court is going to allow the challenge.

MR. VASQUEZ: Please note our objection.

MR. WILLIAMS: Okay. We've got ten jurors?

MS. DaPONTE: Uh-huh (affirmative reply).

MR. WILLIAMS: Do you want to go through another panel? We might get a jury next time.

MS. DaPONTE: Uh-huh (affirmative reply).

THE COURT: Wait. What happened to Mr. Wolfe? He was struck?

MR. WILLIAMS: Who?

MS. DaPONTE: Wolfe. He was accepted.

THE COURT: Oh, he was accepted.

Ms. Stine? The defense out Ms. Stine? So on this panel, we're accepting Mr. Wolfe, Mr. Africh, and Ms. Savoie?

MR. WILLIAMS: Correct.

THE COURT: Three of them, okay.

MR. VASQUEZ: But you all knew I did cut Stine, right?

MR. WILLIAMS: [121] [960] Yes.

THE COURT: All right. What we're going to do is we're going to take a short break and then we'll try to finish.

(The following is taken within the hearing of the prospective jurors.)

THE COURT: Okay. The Court would like to thank and excuse everyone on this panel with the exception of Mr. Africh, Ms. Savoie, and Mr. Wolfe. So, you may leave at this time.

All right. Let's swear in the jurors. (Whereupon chosen jurors are sworn to hear the case.)

THE COURT: All right. Will the bailiff escort the jurors to the jury room.

(Jurors exit courtroom.)

THE COURT: All right. We're going to go ahead and take a ten-minute break now. So, we'll meet back here at 11:40.

(Recess)

THE COURT: All right. Please draw 13 more names at random.

THE LAW CLERK: Number 524, Kevin M. Smith.

Number 547, Patricia H. Trahant.

Number 313, Charles J. Koehl, Jr.

Number 324, Stephen B. Lang.

Number 596, Arthur G. Yaeger, Jr.

[122] [961] Number 462, Anna V. Reber.

Number 163, Karen U. Edmonds.

Number 204, Jacqueline C. Gasper.

Number 428, Dewey J. Parker.

Number 434, John F. Penny, Jr.

Number 439, Joseph H. Perrier.

Number 493, Michael B. Sandras.

Number 150, John B. Donner.

THE COURT: All right. Please give us your full name, address, occupation, marital status and the number and ages of your children, if any. If you are married, please tell us your spouse's occupation if your spouse is employed outside of the home.

Let's begin with you, sir.

MR. SMITH: My name is Kevin Smith. I work for the U.S. Postal Service. I live at 3236 Michigan Avenue in Metairie, and I'm single.

MS. TRAHANT: My name is Patricia H. Trahant. I'm a self-employed tax consultant. I live at 100 Levee View Drive in River Ridge.

MS. DaPONTE: I'm sorry, Ms. Trahant. What do you do?

MS. TRAHANT: I'm a self-employed tax consultant.

My husband is a School Board administrative assistant. I have one stepson, 14.

MR. KOEHL: [123] [962] My name is Charles Jacob Koehl, Jr. I live at 10411 Pam Street, River Ridge. I'm employed with Entergy-LP&L, a mechanic. I'm also

employed with St. Matthew's Church and I maintain other yards. I'm divorced, two children, ages eight and six.

MR. LANG: Stephen B. Lang. I live at 2500 Eastview Drive in Harvey. I am a pipeline drafter for Louisiana Gas Service Company. I'm single, no children.

MR. YAEGER: My name is Arthur G. Yaeger, Jr. I live at 3022 Metairie Court. I'm a retired director of engineering and operations for Entergy's gas system, which is formerly NOPSI. I'm doing some consulting work now, and my wife is an administrative assistant for a medical risk managing company in Metairie.

MS. REBER: Anna Reber. I live at 1204 Airline Park, single. I work at White Funeral Homes.

MS. EDMONDS: Karen Edmonds, 449 Lynnmeade, Gretna. I'm married. My husband is a refinery worker. I've got 3 kids, 28, 24, and 21.

MS. GASPER: Jacquelyn Gasper, 241 Malvern Lane, Harahan. I'm divorced, and I have three children, 46, 44, and 42, and I'm retired.

MR. PARKER: [124] [963] Dewey Parker, 321 West Tish Drive, Avondale. My wife is a housewife and I work for Jefferson Parish Westbank Drainage. I have 4 children, 15, 14, 13, and 7.

MR. PENNY: My name is John Penny. My wife's name is Sharon. We live at 3932 Lake Trail. I have 24, 22, 20, 16, 13, and 10.

MR. PERRIER: Joe Perrier, 3701 West Napoleon in Metairie. I work for Bell South as a manager, and I'm divorced with 3 children, 14, 17, and 22.

MR. SANDRAS: My name is Michael David Sandras. I live at 948 Avenue E in Westwego. I'm an astronomer. I work for the University of New Orleans and for the City of Kenner, and my wife is in the advertising business. There's no children.

MR. DONNES: John Donnes, 1212 North Starrett. Right now, I'm selling auto theft security systems, also service contracts and bail bonds, and I'm retired. I'm married. My wife's a teacher; 4 kids, 39, 37, 35, and 31.

THE COURT: Please answer the questions of the attorneys.

MR. WILLIAMS: Good morning, Ladies and Gentlemen. Were y'all able to hear everything that [125] [964] has been said to the previous groups of prospective jurors? Good.

Mr. Smith, do you have any questions at all about the law that's applicable in this case of first degree murder?

If you were selected as a juror in this case, Mr. Smith, could you consider the imposition of the death penalty?

MR. SMITH: Yes.

MR. WILLIAMS: Ms. Trahant, if you were selected as a juror in this case – And any of you all stop me if you have any questions about anything that I'm saying – could you consider the imposition of the death penalty?

MS. TRAHANT: Yes.

MR. WILLIAMS: Mr. Koehl, if you were selected as a juror, could you consider the imposition of the death penalty?

MR. KOEHL: Yes, except for under certain circumstances.

MR. WILLIAMS: Okay.

MR. KOEHL: If it was a revenge case where somebody raped his children or hurt his family –

MR. WILLIAMS: Okay.

[126] [965] MR. KOEHL: – I think he should be let go free.

MR. WILLIAMS: Okay.

Mr. Lang, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MR. LANG: Yes.

MR. WILLIAMS: Mr. Yaeger, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MR. YAEGER: Yes, sir.

MR. WILLIAMS: Ms. Reber, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MS. REBER: I couldn't make any kind of decision either way. I don't feel like I can. I'm an ex-nun, and I just don't feel like I can make a decision and judge a man.

MR. WILLIAMS: Okay. Let me ask you this question: Do you feel because of your past religious affiliation that it would cause you to be unable to –

MS. REBER: Yes.

MR. WILLIAMS: – judge people, period?

MS. REBER: [127] [966] Yes.

MR. WILLIAMS: And because of that, you don't feel you would be a fair and impartial juror?

MS. REBER: Right.

MR. WILLIAMS: Okay.

Ms. Edmonds, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MS. EDMONDS: Yes.

MR. WILLIAMS: Ms. Gasper, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MS. GASPER: No.

MR. WILLIAMS: All right, Ms. Gasper. Is that based upon a longstanding religious, moral, or personal belief that you have?

MS. GASPER: Yes.

MR. WILLIAMS: All right, ma'am. Could you envision and you've heard us all talking about what we've been talking about today and yesterday, could you envision a set of circumstances that would cause you to change your longstanding belief?

MS. GASPER: No.

[128] [967] MR. WILLIAMS: Mr. Parker, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MR. PARKER: No.

MR. WILLIAMS: All right, Mr. Parker. Is that based upon a longstanding –

MR. PARKER: Religion, Religious.

MR. WILLIAMS: Religious belief? Can you envision any set of circumstances that could cause you to change your mind?

MR. PARKER: No.

MR. WILLIAMS: Okay. Mr. Penny, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MR. PENNY: Yes, I could.

MR. WILLIAMS: Mr. Perrier, could you consider the imposition of the death penalty if you were selected as a juror in this case?

MR. PERRIER: No, I could not.

MR. WILLIAMS: All right, sir. Is that based upon a longstanding religious, moral, or personal belief you have?

[129] [968] MR. PERRIER: Religious.

MR. WILLIAMS: Could you envision any set of circumstances that could cause you to change your mind?

MR. PERRIER: No, sir.

MR. WILLIAMS: Mr. Sandras, if you were selected as a juror, could you consider the imposition of the death penalty?

MR. SANDRAS: Yes, I could.

MR. WILLIAMS: Okay.

Mr. Donnes, if you were selected as a juror in this case, could you consider the imposition of the death penalty?

MR. DONNES: Yes.

MR. WILLIAMS: All right. Now, those of you all who have answered that you could consider the imposition of the death penalty, we'll get right to it: Are there any of you all who feel that that is the only penalty that you could impose, and you would not, under any circumstances, consider life imprisonment? Is there anybody that feels like that?

Mr. Smith, so if you find him guilty of murder, as far as you're concerned, you would automatically impose the death [130] [969] penalty; it does not matter what evidence they put on?

MR. SMITH: Yes.

MR. WILLIAMS: Okay. Ms. Edmonds, do you feel the same way?

MS. EDMONDS: Yes.

MR. WILLIAMS: That if you found the defendant Allen Snyder guilty as charged of first degree murder, that it had gotten to the penalty phase, your mind would be made up in advance of hearing any of the evidence?

MS. EDMONDS: I think he should be put to death.

(Court Reporters requests that prospective juror speaks up.)

MS. EDMONDS: I think you should be put to death.

MR. WILLIAMS: Is there anybody else who feels like that?

MR. LANG: I think that you would have to show some extenuating circumstances as to why not.

MR. WILLIAMS: Well, my question to you is –

MR. LANG: It would –

MR. WILLIAMS: And it's up to them to do that.

[131] [970] MR. LANG: – It would be hard to dissuade me from that.

MR. WILLIAMS: But the bottom-line question, Mr. Lang, is: Could you listen to the evidence that they put on before you made up your mind?

MR. LANG: Yes.

MR. WILLIAMS: Okay.

All right, Ladies and Gentlemen, let me ask you about your feelings regarding the insanity defense. I've already pretty much said everything that needs to be said, as the Defense has, and I think you all right now know how you feel about it, and I'd like to know those of you all who are seated here, are there any of you all who can tell both sides now that you – Let me ask the question this way: Ms. Trahant, if you were selected as a juror in this case, could you listen to evidence of an insanity plea, consider it, and then accept it or reject it?

MS. TRAHANT: Yes. I just have one question.

MR. WILLIAMS: Sure.

MS. TRAHANT: Do you have to be convinced that the person does not know right from wrong, or do you have to – Or is it a circumstance [132] [971] that they could – That something overwhelmed their knowledge of right and wrong and caused them to commit murder?

MR. WILLIAMS: I'll tell you exactly what it is. Before you can consider finding – Returning a verdict of not guilty by reason of insanity, you would have to be convinced by a preponderance of the evidence, which is more likely than not, that Allen Snyder, at the time of the killing, suffered from a mental disease or defect and that because of that mental disease or defect, he did not know the difference between right and wrong. And based upon your own experience, your own knowledge, that is exactly what the law is. Does that answer your question?

MS. TRAHANT: Yes, sir.

MR. WILLIAMS: Okay. And you're able to listen to all of the evidence, you can accept expert opinions from doctors, you can reject it. What you do is you listen and you decide based upon your common knowledge and your common experience and just, you know, everything that you know, and you decide whether or not they've proven that to you by a preponderance of the evidence. That's the best I can do for you.

All right. And with that, ma'am, could you listen to that evidence, consider it and then accept it or reject [133] [972] it?

MS. TRAHANT: Yes, sir.

MR. WILLIAMS: Okay.

Mr. Koehl, how about you, sir?

MR. KOEHL: I could do it, but I'd have to hear the medical evidence and it would have to be long-termed. I wouldn't accept short-term.

MR. WILLIAMS: Okay. But by your saying that, you could listen to the evidence?

MR. KOEHL: I could listen to it.

MR. WILLIAMS: And then –

MR. KOEHL: Accept it or reject it.

MR. WILLIAMS: If it's long – If you feel he's suffered a long time from this, then it would be something you'd consider?

MR. KOEHL: Consider.

MR. WILLIAMS: And if not, if he didn't, then you would reject it; is that correct?

MR. KOEHL: Right.

MR. WILLIAMS: Mr. Lang, how about you, sir?

MR. LANG: [134] [973] I can listen to it.

MR. WILLIAMS: Mr. Yaeger?

MR. YAEGER: Yes.

MR. WILLIAMS: Let's see. Mr. Donnes, could you listen to the insanity defense and then decide what weight you would give to it, if any?

MR. DONNES: I have a little problem with that. I could accept guilty and insane, but I can't reconcile my feelings.

MR. WILLIAMS: Okay. Let me make sure I've got you right, and I'm not putting pressure on you. At this point, we don't know if they're going to put on evidence of insanity or not. By their plea, they have the right to do that, okay? If they try to show that he did the crime, but at the time that he did the crime, he was insane, they have to prove to you, they do, by more likely than not, that at the time he did it, he had a mental disease or defect that rendered him unable to tell the difference between right and wrong. Now, they can call doctors. They could put on any, you know, people that were witnesses and saw what happened. You will hear about the circumstances that surrounded the action, and then you will have to decide if they've proven it to you or if [135] [974] they haven't. The bottom line is: Could you tell us that you would listen to what they have to say?

MR. DONNES: I would.

MR. WILLIAMS: Okay. That's all. We're not asking you now to say, I believe in the insanity defense or that I could envision circumstances where it could happen. All you have to say now is you could listen to the evidence and then decide what weight you will give it, if any. That's the bottom line.

MS. DaPONTE: Judge, I have to object. The bottom line is whether he could consider it as a valid defense. He doesn't have to believe the testimony that he hears, Mr. Williams is right, but he has to be able to consider it as a valid defense.

MR. WILLIAMS: Well, it is a valid defense because it's the law. I mean, it's on the books. It's not something we made up today, and that's correct. I agree with that. If it wasn't a valid defense, it wouldn't be in this book. Did you understand that?

MR. DONNES: I understand that.

MR. WILLIAMS: Does that change your opinion?

MR. DONNES: No.

[136] [975] MR. WILLIAMS: Okay.

Mr. Sandras, how do you feel, sir? Could you listen to evidence of insanity, consider it and then accept it or reject it?

MR. SANDRAS: First of all, I think that any act of murder is insanity. I think it's a very tough distinction between the two. I think it's actually been blurred. I could listen to evidence, but it would be an exception to the rule, I have to say, and there's exceptions to everything. So, I could listen to it, but my feelings would be against it.

MR. WILLIAMS: Okay, I would like to have a conversation with you about that, but we don't have the time now. But that's why, you're exactly right, because virtually everybody here would have to agree. Somebody commits a terrible crime either has to be crazy but believable distinction is not insanity. It is: Did the person know the difference between right and wrong? It's very easy.

MR. SANDRAS: And I can understand that, but as I had said, I could listen but my feelings are against it.

MR. WILLIAMS: Okay.

MR. SANDRAS: [137] [976] It's just – I just want my feelings.

MR. WILLIAMS: That's fine.

Let's see. Mr. Penny, how about you, sir? Could you listen to – If it's brought forth by them, and we don't know if it is yet or not – If they put on evidence of insanity, could you listen to it, consider it, and then accept it or reject it?

MR. PENNY: I could.

MR. WILLIAMS: Okay. All right.

Now, who here has sat on a jury before? Let's see. Mr. Yaeger [sic], could you tell me what kind of case, sir, criminal or civil?

MR. PENNY: They were both criminal.

MR. WILLIAMS: Okay.

MR. PENNY: In Orleans Parish.

MR. WILLIAMS: All right.

MR. PENNY: Many years ago. One was, – I think, if I recall they were both armed robbery.

MR. WILLIAMS: Okay. And do you recall the verdicts in the cases?

MR. PENNY: One was a guilty, and the other was a [138] [977] mistrial, hung jury.

MR. WILLIAMS: Okay.

In the back row, Mr. Donnes?

MR. DONNES: About three times, Orleans Parish, 20 years ago, I guess.

MR. WILLIAMS: Okay.

MR. DONNES: One was – They were all five-man juries. One was guilty. One was hung, and I don't know what happened to the other one.

MR. WILLIAMS: Okay. They were all minor crimes like theft or burglary or something?

MR. DONNES: Well, yes and no. It was aggravated battery or attempted murder, one or the other.

MR. WILLIAMS: Okay.

Who else in the back row? Let's see, Mr. Penny?

MR. PENNY: I was on a second degree murder.

MR. WILLIAMS: Was that here in Jefferson Parish?

MR. PENNY: Here in Jefferson Parish.

MR. WILLIAMS: How long ago was that, sir?

MR. PENNY: [139] [978] 10 or 15 years ago.

MR. WILLIAMS: Do you remember the verdict of the jury?

MR. PENNY: The verdict was guilty.

MR. WILLIAMS: Okay. Were you the foreperson of that jury?

MR. PENNY: No, I wasn't. He was guilty of manslaughter and not of second degree murder.

MR. WILLIAMS: Oh, so the jury came back with a responsive verdict of manslaughter?

MR. PENNY: Manslaughter.

MR. WILLIAMS: Okay.

Now, I'll ask you: Ms. DaPonte has suggested the charge of manslaughter as something she wanted the jury – to get the jury's feelings about, and you obviously understand how the process works, having already done that. Do you understand, sir, that – You understand. I don't need to ask you anymore, sir.

Okay. Let's see. What about domestic abuse? Yet, another thing that has been talked about. We have no evidence of that yet, but since it's been talked about, I need to know: Are there any of you all who feel that because it has been brought [140] [979] out that there might be evidence of domestic abuse, that that would cause you to automatically find Allen Snyder guilty as charged in this crime? Is there anybody who feels like that? Okay.

Now, Ladies and Gentlemen, is there anything that any of you all would like to tell me at this time, anything about yourselves that you think might enable me to make a more formed choice about yourselves?

Yes, sir?

MR. SANDRAS: I just would like to point out that in my profession, I'm also the director of the Planetarium Observatory, which is in Rivertown which is adjacent to where this act occurred, and I did read a lot about it. I do not remember the names or anything like that, but because it affected the area that I work in, being somewhat of a tourist area, it was something that I just followed to some extent.

MR. WILLIAMS: Let me ask you this, Mr. Sandras, and this is the bottom-line question on that: Based upon what you know about this case, if anything, whatever it is you know, have you already made up your mind regarding the innocence or guilt of Allen Snyder?

MR. SANDRAS: No.

MR. WILLIAMS: [141] [980] Okay.

Thank you.

MR. KOEHL: I have one –

MR. WILLIAMS: Yes, sir?

MR. KOEHL: I got to tell you how I feel, personally, okay?

MR. WILLIAMS: Sure. I want you to.

MR. KOEHL: I believe in vigilantes, you know, that if somebody hurts your family, you know, you go to any extreme to take care of it, you know, even if they're in jail, you know?

MR. WILLIAMS: You make that very clear.

MR. KOEHL: If it happened to my family, you know, I'd take care of that person while he was in jail.

MR. WILLIAMS: And you've heard some talk about vigilante stuff in this case during jury selection?

MR. KOEHL: A little bit, you know, but I truly believe in. I believe in contracts, you know? If somebody hurts somebody in your family, you know, I'd go to any extreme.

MR. WILLIAMS: Okay. I appreciate your honesty.

[142] [981] MR. KOEHL: That's how I feel.

MR. WILLIAMS: Is there anybody else that has anything they'd like to say?

Thank you. I tender the panel.

MS. DaPONTE: Before I get started, is there anyone who has any personal reasons – I know we asked before for very, very pressing reasons why you couldn't serve. Anybody have any personal reasons that would make it very difficult for you to serve, difficult for you to concentrate because of something that – some obligation that you might have for the next few days?

No? All right.

MR. LANG: I have livestock that I have to tend to. I own bulls and –

MS. DaPONTE: You have livestock?

MR. LANG: Yes.

MS. DaPONTE: And –

MR. LANG: And I'd have to make arrangements for somebody to take care of them.

MS. DaPONTE: Is there anything that's going to be of such pressing concern that you would not be able to pay attention and be fair?

MR. LANG: [143] [982] I mean, it's not that I wouldn't be able to pay attention to them, but I'd have to find someone to take care of them.

MS. DaPONTE: Okay.

Yes, sir?

MR. SANDRAS: I know it's true for everyone, but work for me since I do teach at UNO and I just started yesterday and it's the beginning of the semester; so, any prolonged absence, it becomes a real problem.

MS. DaPONTE: Would you have trouble concentrating?

MR. SANDRAS: To some extent, because I'm responsible as far as the students, obviously, and I'd have to somehow pass on the information concerning work.

MS. DaPONTE: All right. Thank you.

Mr. Donnes?

MR. DONNES: I'd have to cancel too many things.

MS. DaPONTE: Would – There was a – You had told us that you might have a problem with this afternoon to get back at work or not?

MR. DONNES: I've got – I've got a serious appointment this afternoon that I've got to attend.

[144] [983] MS. DaPONTE: Okay. And would that be a problem such that you couldn't pay attention to the trial?

MR. DONNES: It wouldn't be – No one else can do it.

MS. DaPONTE: Thank you.

MR. DONNES: It would have to be postponed. That would cause a problem.

MS. DaPONTE: That would cause a problem. All right.

Yes, sir?

MR. YAEGER: I have a longstanding commitment to an event that's going to take place on Sunday that I've been an integral part of for many years.

MS. DaPONTE: I could almost guarantee you that that won't be affected, but I appreciate you're telling me. I think we will be out of here by then.

MR. YAEGER: I'd have to make some phone calls and take care of my animals, too, you know?

MS. DaPONTE: All right.

MR. YAEGER: – before it started.

MS. DaPONTE: [145] [984] And do you think that you'd be able to do that? Do you think you'd be able to make those arrangements?

MR. YAEGER: Yes.

MS. DaPONTE: Think so? Wouldn't be a problem. All right.

Mr. Donnes, I wanted to start with you because of your feelings about the insanity defense. You indicated that you could listen to the evidence, but I'm not sure that I ever heard whether you could actually consider it as a valid defense.

MR. DOWNES: I have a little problem with not guilty and not guilty by insanity. It seems like you're saying the same thing twice but in the wrong way, because if you did it, if you're saying, I did it, but I'm not guilty, but I'm not guilty because I'm insane, I mean, I can't have two sides.

MS. DaPONTE: I understand. I understand.

Well, that brings me –

MR. DONNES: I could say, in other words, he was guilty and he was insane.

MS. DaPONTE: Okay.

MR. DONNES: Or he's guilty for other reasons.

MS. DaPONTE: [146] [985] All right.

MR. DONNES: But I can't have not guilty just because he went insane.

MS. DaPONTE: I understand what you're saying. So let me ask you the rest of my question, which is: If you determined that we didn't prove by a preponderance of the evidence that Mr. Snyder was suffering from a mental disease or defect, you didn't believe the evidence that we put on or you believe that that evidence maybe it showed that he had a mental disease or defect, but you didn't believe that he was unable to distinguish right from wrong. All right. Let's say we've gotten that far. You were not persuaded; so, my question to you is: Can you consider the entire range of defenses at that point based on his not guilty plea? I didn't put that very well at all. I'm sorry.

Let me ask it to you this way: Is it for you, it's either, All right, he's insane, so he's not guilty, or, He's not insane, so he must be guilty?

MR. DONNES: Can you go back on that?

MS. DaPONTE: I'm sorry. You're right; we have two pleas, and it's very confusing. It's not guilty and it's not guilty by reason of insanity. And my question to you is: If you find that he was sane, so you're not [147] [986] going to find him not guilty by reason of insanity, you're just not, would you then consider whether or not the state had proved that he was actually guilty?

MR. DONNES: Would I say that he was actually guilty?

MS. DaPONTE: All right. So you would be able to consider the defenses available to him under his not guilty plea? In other words, you'd be able to decide if the State didn't prove its case, well, he's not guilty, right?

MR. DONNES: I don't care what you say now until we see that evidence. I'd like to either hear and see the evidence as to whether I think he's guilty or not.

MS. DaPONTE: I see what you're saying, and that doesn't have anything to do with the insanity plea.

MR. DONNES: What he pleas to.

MS. DaPONTE: Okay. I appreciate that. Thank you.

And then, let's return to my first question: Can you consider evidence of insanity, and if you find that he didn't – Well, let me ask you this: Can you consider that the – You are going to hear evidence of a mental disease or

defect. It'll be up to you to determine whether it [148] [987] existed and if it existed, whether he knew right from wrong. If you find that he didn't know right from wrong, could you consider that that's a defense?

MR. DONNES: If he didn't know right from wrong?

MS. DaPONTE: Right.

MR. DONNES: Um, I –

MS. DaPONTE: Could you consider that he would be not guilty if he did not know right from wrong because of a mental disease?

MR. DONNES: Possibly.

MS. DaPONTE: Okay. That's all we need. Thank you, Mr. Donnes.

If Mr. Snyder – First of all, can everybody presume that Mr. Snyder is innocent?

Mr. Koehl, you can presume he's innocent of the crime?

MR. KOEHL: Yes.

MS. DaPONTE: All right.

Does everybody else have the same mind-set right now?

Mr. Penny, he's innocent right now, correct?

MR. PENNY: Right.

[149] [988] MS. DaPONTE: All right.

Mr. Lang, you feel that way?

MR. LANG: Yes.

MS. DaPONTE: Okay. And if Mr. Snyder were to rest upon his presumption of innocence and he were to elect not to take the witness stand, Mr. Sandras, do you think that you would hold that against him?

MR. SANDRAS: No, because I realize that it's your tactic.

MS. DaPONTE: Tactic? So, you could hold that against me, maybe, but not against –

MR. SANDRAS: Very easily.

MS. DaPONTE: – against him? Very easily, okay.

All right. But you would not transfer any feelings you might have about me to my client?

MR. SANDRAS: Correct.

MS. DaPONTE: Okay. Thank you.

And, Mr. Lang, how about you?

MR. LANG: I wouldn't hold it against him.

MS. DaPONTE: Okay.

Mr. Yaeger?

[150] [989] MR. YAEGER: No.

MS. DaPONTE: Mr. Penny?

MR. PENNY: I wouldn't hold it against him.

MS. DaPONTE: Mr. Koehl?

MR. KOEHL: I wouldn't hold it against him, but, you know, I question in the back of my mind why and I'll hold it more against you, you know?

MS. DaPONTE: Okay. That's fine.

MR. KOEHL: Yeah.

MS. DaPONTE: You can chew me out anytime you see fit.

MR. KOEHL: Because, to me, you ought to be truthful, you know –

MS. DaPONTE: Okay.

MR. KOEHL: – say it like it is.

MS. DaPONTE: Okay.

Ms. Trahant?

MS. TRAHANT: No, I wouldn't hold it against him.

MS. DaPONTE: Mr. Donnes, how about you? If Mr. [151] [990] Snyder were not to take the witness stand, would you hold that against him?

MR. DONNES: No.

MS. DaPONTE: All right. Thank you.

Can we talk about the elements of manslaughter for a while? Mr. Penny, you sat on a jury where the defendant was found guilty of the lesser crime of manslaughter. You understand that manslaughter is a crime where the elements of murder have actually been met?

MR. PENNY: Right.

MS. DaPONTE: And because of inflammation, heat of passion, provocation, the murder was actually mitigated to a manslaughter. Is that what happened in your case?

MR. PENNY: Well, the way the Judge told us or defined the law to us, read the law to us, it was a clear case of manslaughter and not of second degree.

MS. DaPONTE: Okay.

Mr. Lang, can you conceive of a set of circumstances where a homicide that would meet the elements of murder might be mitigated downward to manslaughter, like happened in Mr. Penny's case?

MR. LANG: It would depend on the circumstances.

[152] [991] MS. DaPONTE: Okay. But you could – You could –

MR. LANG: Like you're saying about the heat of passion, that type of thing, I don't believe in that.

MS. DaPONTE: You don't buy that, okay. And so, you feel like pretty much every murder is going to be either first degree murder or second degree murder?

MR. LANG: Right.

MS. DaPONTE: Okay.

Mr. Sandras, how do you feel about the concept of manslaughter? Can you see a case where a homicide might be mitigated down to a murder because of heat of passion?

MR. SANDRAS: Yes.

MS. DaPONTE: Okay.

Mr. Donnes, how about you?

MR. DONNES: I've got no problem with that.

MS. DaPONTE: Okay.

Mr. Yaeger?

MR. YAEGER: No.

MS. DaPONTE: No problem with that?

[153] [992] MR. YAEGER: I can understand it.

MS. DaPONTE: Okay.

Mr. Koehl?

MR. KOEHL: The only way I would go for manslaughter, like I said, if somebody really abused his children or his wife. And like you take the Baton Rouge case, that was the greatest thing I ever seen besides the birth of the children, you know, and animals. That's revenge.

MS. DaPONTE: Okay.

Ms. Trahant, could you conceive of a set of circumstances where a homicide that met the definition of murder would be mitigated down to a manslaughter?

MS. TRAHANT: I could see that.

MS. DaPONTE: Would everybody be able to recognize sensational or irrelevant evidence and screen that out, not be swayed by that as a juror? Everybody could that? All right.

And I think that's all I have at this point. Mr. Vasquez has some questions for you.

MR. VASQUEZ: Good afternoon, Ladies and Gentlemen. I'll try to be as brief as possible.

I want to go ahead and take you all [154] [993] forward again. Let's assume we're now in the sentencing phase of this trial. Is everybody with me?

Mr. Lang, you indicated that if there were extenuating circumstances, that you could impose – consider, not impose, but consider life imprisonment. Is that not what you indicated earlier? I want to make sure I –

MR. LANG: It would – If he killed someone, I think he should get the death penalty unless, like this gentleman had said, it was a crime against his family.

MR. VASQUEZ: Okay. So –

MR. LANG: If someone killed one of his children and molested one of his children, something like that, then, you know, life imprisonment, yes.

MR. VASQUEZ: Let's assume you don't have that situation. Can you envision any other circumstances where you might consider life imprisonment?

MR. LANG: No. If it was cold-blooded murder, I think he should get the death penalty.

MR. VASQUEZ: Is there anything that I could present, and again, if you found him guilty of first degree murder, so guilt or innocence is now out the window. It's now [155] [994] life versus death.

MR. LANG: Death penalty.

MR. VASQUEZ: Death penalty? If I present evidence to you that he cared about his kids and he worked hard, he provided for them –

MR. LANG: That's irrelevant. He still killed somebody.

MR. VASQUEZ: Okay. If I provided – It was mentioned by the State earlier that he was a Marine, he's an ex-Marine – That's irrelevant?

MR. LANG: He took a human being's life.

MR. VASQUEZ: Okay. Thanks for your honesty on that.

Mr. Yaeger, how do you feel about my questions regarding that particular issue?

MR. YAEGER: As far as you putting on some defense of mitigating circumstances, I'd certainly listen and consider it.

MR. VASQUEZ: Okay. Your mind would not be so predisposed that if you found Mr. Snyder guilty of first degree murder, that you would automatically impose the death penalty?

MR. YAEGER: No.

[156] [995] MR. VASQUEZ: You would be able to keep an open mind about it?

MR. YAEGER: Yes.

MR. VASQUEZ: Mr. Perrier, I see you nodding your head back there. In fact, you said you couldn't consider the death penalty.

MR. PERRIER: No.

MR. VASQUEZ: So, okay.

Mr. Koehl, I understand how you feel. You've made it pretty clear to all of us, but the same question that I asked Mr. Lang: Let's assume that you found him guilty of first degree murder, and you don't have that revenge type of thing, you know, somebody molested one of Mr. Snyder's children or anything like that.

MR. KOEHL: The only other way he would get life imprisonment with me is if he came home and caught his wife in the act, okay, with another man, in his house, in his own house. That's the only way I would say life imprisonment.

MR. VASQUEZ: There's no other circumstance that you could envision?

MR. KOEHL: No other circumstance. All right. You got to deal with life, you know?

[157] [996] MR. VASQUEZ: All right. And there's nothing that I could present you – Let's assume that I presented to you that he was under some sort of – And I'm not talking about insanity, okay? Let's assume that you have determined that he knew right from wrong and that he's guilty, and now we're just determining life versus death, and I present to you some evidence that he was under some sort of extreme emotional and mental disturbance when this act occurred.

MR. KUEHL: I'd wait – I don't know – I have to hear the evidence, you know? I'd really have to hear it. Okay? But he took somebody's life and, to me, you know, you know how I stand, okay –

MR. VASQUEZ: I'm sorry. I didn't hear you.

MR. KOEHL: I mean, he took somebody's life and, you know, to me, is, you know, is death, you know, unless it was the circumstances that I drew right there, and that's where I draw my line with everything.

MR. VASQUEZ: Okay.

Ms. Trahant, assuming that I present some sort of mitigating evidence that Mr. Snyder was operating or acting under some sort of extreme emotional or mental disturbance when this alleged crime occurred, is that something that you could [158] [997] consider in deciding life versus death?

MS. TRAHANT: I would consider it.

MR. VASQUEZ: Is it something you could seriously consider?

MR. WILLIAMS: Objection, Judge. There's no requirement to what amount of weight you give. It's just whether or not you could consider it.

MR. VASQUEZ: Judge, I'm asking questions. I'm entitled to do it.

THE COURT: Objection overruled.

MR. VASQUEZ: Thank you.

Is that something that you could seriously consider?

MS. TRAHANT: Well, I would seriously consider it because it's his right to have –

MR. VASQUEZ: Okay.

MS. TRAHANT: – everything considered.

MR. VASQUEZ: I'm not saying you have to agree with it or anything. I'm just trying to determine whether you can keep an open mind.

If I present evidence to you that he's a hard-working man, that he was a good [159] [998] neighbor, stuff like that, is that something that you could consider in deciding, you know, death versus life? Because some people can't. Some people say, Look, just like Mr. Lang, who was pretty forthcoming, say, Look, hey, you killed somebody. That's it. And there's nothing wrong with having that opinion. So –

MS. TRAHANT: I would think the evidence you just gave an example of would not be given equal weight by anyone as they would give to circumstances that –

MR. VASQUEZ: Right.

MS. TRAHANT: – would be more germane to –

MR. VASQUEZ: Right.

MS. TRAHANT: – a person who's been found guilty of killing someone.

MR. VASQUEZ: And the jury is the one who gives weight to the evidence, but if I'm hearing you correctly, is that something –

MS. TRAHANT: If you tell me he was a hard-working man and a good neighbor, I don't think that would

be as significant as some other circumstances you could bring up.

MR. VASQUEZ: Are you telling me, then, that you [160] [999] can't consider that, if I present evidence to –

MS. TRAHANT: I would consider it, but I'm just saying that I don't think that that would be giving equal weight to the evidence, but I would consider it.

MR. VASQUEZ: Judge, just one moment, please.

Mr. Donnes, if I could ask you a couple of questions, sir, and I don't mean to get personal, but is Burt Donnes your son?

MR. DONNES: Yes.

MR. VASQUEZ: And Burt is a defense attorney; is that correct?

MR. DONNES: Yes.

MR. VASQUEZ: Okay. Does the fact that your son is a defense attorney, influence you one way or the other – Would it influence you one way or the other if you were to sit on this jury?

MR. DONNES: Not necessarily.

MR. VASQUEZ: Would it jade you more to one side than the other?

MR. DONNES: I don't think so.

MR. VASQUEZ: [161] [1000] Okay. If you –

MR. DONNES: I'm working for Mr. Capella, too, on Saturdays.

MR. VASQUEZ: Right.

MR. DONNES: I'm on both sides of that.

MR. VASQUEZ: I was going to ask you that. Would the fact that you know Mr. Capella, you said you were helping him out with his campaign?

MR. DONNES: Whenever I had a little time on Saturdays, I'd try to go over there.

MR. VASQUEZ: Sure. And the fact that you're helping him with his campaign, would that be something that would influence you one way or the other if you were to sit on this jury?

MR. DONNES: It would not make my decision up.

MR. VASQUEZ: It would not make your decision up?

MR. DONNES: No.

MR. VASQUEZ: All right.

Assuming you're in the penalty phase of this case and I present some evidence to you that Allen Snyder was acting under some sort of emotional distress or mental [162] [1001] distress of some sort, and I'm not talking about insanity now, forget about that. Let's assume you decided he knew right from wrong. Is that something that you could consider in deciding life versus death?

MR. DONNES: Possibly by that time it would be almost seemed like they'd gotten manslaughter instead of the death penalty. I could vote on it.

MR. VASQUEZ: But let's assume it's first degree murder.

MR. DONNES: I could consider some things.

MR. VASQUEZ: All right. Would you be able to listen to all mitigating – consider all mitigating circumstances that I may choose to present on behalf of Allen Snyder?

MR. DONNES: Yes.

MR. VASQUEZ: Ms. Trahant, I believe you indicated earlier you were from River Ridge?

MS. TRAHANT: Yes, sir.

MR. VASQUEZ: Does the fact that this crime may have occurred in River Ridge, would that affect you in any way?

MS. TRAHANT: I don't think so.

[163] [1002] MR. VASQUEZ: It wouldn't have an –

MS. TRAHANT: I don't recall anything about it.

MR. VASQUEZ: Okay.

Thank y'all very much.

MR. WILLIAMS: Your Honor, permission to traverse just one prospective juror.

Mr. Lang, just a question, sir. You told Ms. DaPonte that you had a problem with heat of passion. Do you understand that if – That doesn't excuse the murder? Somebody that's found guilty of manslaughter can still face up to 40 years in the penitentiary.

MR. LANG: I don't understand that yet.

MR. WILLIAMS: I'm sorry. I didn't mean to interrupt.

MR. LANG: Go ahead, Counsellor.

MR. WILLIAMS: Let me give you the example that Mr. Koehl's mentioned and you've heard them mention, and I'll make it even better, easier for you to decide. Let us suppose that a man is held captive as he watches his wife and children abused, raped, whatever, and he manages to break loose. He kills those people who did that crime to his wife and children. Would you [164] [1003] consider a heat of passion killing, that he was so angered and so incensed by watching those people do that, as he was able to break free, since it was like almost immediately or as he was watching, that that could be a circumstance that somebody – Put yourself in that circumstance.

MR. LANG: Wouldn't that be more of a self-defense, though –

MR. WILLIAMS: Possibly.

MR. LANG: – when you're protecting your family?

MR. WILLIAMS: Well, let me make an example to where those people weren't armed, that they just held him back with their own, you know, strength, without any weapons, and he broke loose and killed the people. Could you consider that as being a heat of passion killing?

MR. LANG: Possibly.

MR. WILLIAMS: In other words, if you can keep an open mind and listen – You don't have to do it. If you

can tell us that you'll follow the law that the Judge will give you and he will give you a long instruction on what manslaughter is, and you can listen to that instruction, what he tells you about what it is, and apply [165] [1004] that to the law that you've heard, to the evidence that you've heard. That's the bottom line.

MR. LANG: I can't promise you I could do that, no.

MR. WILLIAMS: Okay.

MR. LANG: Not from my personal belief.

MR. WILLIAMS: Okay. Thank you.

(The following is taken outside the hearing of the of the prospective jurors.)

THE COURT: Any challenges for cause?

MR. WILLIAMS: Mr. Perrier said he could not consider the death penalty. Ms. Reber said she could not judge, and Ms. Gasper could not consider the death penalty.

MR. OLINDE: And Dewey Parker.

MR. WILLIAMS: Mr. Parker, likewise, could not consider the death penalty; although, I think I'll keep him.

Those are my challenges.

THE COURT: Say the names, again.

MR. WILLIAMS: Reber, Perrier, Parker, and Gasper. Those are my challenges.

MS. DaPONTE: [166] [1005] We challenge Smith.

MR. WILLIAMS: No objection.

MS. DaPONTE: Koehl.

MR. WILLIAMS: Objection.

MS. DaPONTE: He says the only way that he could consider a life sentence would be if it was a revenge killing.

MR. WILLIAMS: And he also said if somebody was caught – He virtually gave the facts of this case as being one of the circumstances where he could consider life imprisonment.

MS. DaPONTE: All right. Well, note my objection.

THE COURT: Well, I haven't ruled yet on any of these.

MS. DaPONTE: I'm sorry, Judge.

THE COURT: We're just speeding right through.

MS. DaPONTE: I'm sorry.

THE COURT: All right. I'm going to grant your challenges for cause to Gasper, Parker, Perrier, and Reber.

MR. OLINDE: You granted hers for Smith, too, [167] [1006] Judge. That's the first one she raised.

Who's your second?

MS. DaPONTE: It's Koehl.

MR. OLINDE: Your Honor, I don't know that he's challengeable for cause. He wasn't auto death or auto life.

THE COURT: Mr. Koehl, would you come over for a second?

(Mr. Koehl. joins the Judge and Counsel at the bench, out of the hearing of prospective jurors.)

MR. KOEHL: Sir?

THE COURT: The question, the issue was brought up about what circumstances would you consider giving life instead of death, all right?

MR. KOEHL: Wait, would I consider giving him life instead of death?

THE COURT: Right.

MR. KOEHL: If the circumstances came up where he came home and he found his wife in bed with a man in his own house, yes. Anything else is death.

THE COURT: Could you consider any other type of circumstances?

MR. KOEHL: [168] [1007] Not really. He took somebody's life, you know? To me, life is precious, but if you cross the boundaries, you know, if somebody hurts your family, then, you know, that's just my beliefs, okay?

THE COURT: No problem. Thank you.

(Mr. Koehl rejoins prospective jurors remaining outside the hearing of prospective jurors.)

THE COURT: Are you going to challenge?

MR. WILLIAMS: Well, my response to that is: That is one of the mitigating circumstances.

THE COURT: I'm going to grant a challenge for cause.

MS. DaPONTE: Thank you.

Challenge Stephen Lang because basically the answer to Mr. Williams' question: Could you promise to accept the law? He said, No, I'm sorry, I can't promise that I could.

MR. OLINDE: He said he couldn't swear under his own personal beliefs, but he did say that there were certain manslaughter cases he could go either way.

MS. DaPONTE: No, Actually, he didn't. Mr. Williams gave him every opportunity to go, and he said –

THE COURT: [169] [1008] I'm going to grant the challenge for cause.

MS. DaPONTE: Karen Edmonds, automatic death.

MR. WILLIAMS: No objection.

THE COURT: Mr. Williams?

MR. WILLIAMS: Ms. Trahant is accepted by the State. Is that 11?

MS. DaPONTE: Yes.

MR. WILLIAMS: Okay. At this time, we backstrike Ms. Rizzo.

Actually, I'm changing that to Ms. Savoie, backstriking Ms. Savoie.

MR. OLINDE: She was on the last panel, Judge, second, bottom, in that chair.

MS. DaPONTE: So, Ms. Trahant is juror 10.

MR. WILLIAMS: Correct.

MS. DaPONTE: Okay.

MR. WILLIAMS: And I accept Mr. Yaeger.

MS. DaPONTE: Accepted.

MR. WILLIAMS: Accept Mr. Penny.

[170] [1009] MS. DaPONTE: Judge, at this time we would accept Mr. Yaeger. We would exercise a backstrike against Timothy Christiansen.

MR. OLINDE: What panel was he on?

MS. DaPONTE: First panel.

MR. WILLIAMS: What defense is that?

MS. DaPONTE: Nine.

MR. WILLIAMS: So, we've got ten?

MS. DaPONTE: So, Yaeger is ten.

MR. WILLIAMS: Did you take Penny or no?

MS. DaPONTE: That's where we are on now. Yes, Penny will be accepted.

So, he's now Juror 11.

MR. WILLIAMS: We're not going to get a panel here because we need two alternates. We backstrike Ms. Savoie.

MR. VASQUEZ: We have 10 jurors or 11, now?

MS. DaPONTE: You already did backstrike Savoie.

MR. VASQUEZ: You've got two of them?

MS. DaPONTE: Rizzo.

[171] [1010] MR. VASQUEZ: So, we're back down to ten?

MS. DaPONTE: This is ten.

MR. WILLIAMS: And Mr. Sandras is acceptable.

MS. DaPONTE: We'll excuse Mr. Sandras.

MR. WILLIAMS: Mr. Donnes is acceptable.

MS. DaPONTE: Mr. Donnes is acceptable to us, too.

MR. OLINDE: You guys have used ten, Graham?

MS. DaPONTE: Yes.

(The following is taken within the hearing of the prospective jurors.)

THE COURT: All right. The Court would like to thank and excuse everyone with the exception of Ms. Trahant, Mr. Yaeger, Mr. Penny, and Mr. Donnes at this time.

All right. Let's swear in the new jurors.

(Chosen jurors are sworn to hear the case.)

THE COURT: All right. Please escort the jurors to the jury room.

(Whereupon, jurors exit courtroom.)

THE COURT: All right. We're going to go ahead and break for lunch now. We're going to take a one-hour break. So, we're going to [172] [1011] try to begin at 1:45. We need to pick a couple of more jurors; so, be back here for 1:45.

MR. WILLIAMS: Okay. Thank you.

(Recess for Lunch.)

THE COURT: Please read 13 more names.

THE CLERK: Number 142, Jessie Devillier.

Number 544, Cherie L. Touchard.

Number 183, Gerald Fontan, Jr.

Number 286, Herric Jordan.

Number 108, Michael Chatellier.

Number 383, Jennifer Miller.

Number 400, JoAnn Mulvihill.

Number 458, Roland Provencal.

Number 569, Aubranell Waits.

Number 397, Lloyd Morvant, Sr.

Number 325, Roland Laws, Jr.

Number 282, Louis Johnson.

THE COURT: Call another one.

THE CLERK: Number 291, Julie Kaiser.

Number 573, Joy R. Wappler.

THE COURT: Okay. Please give us your full name, address, occupation, marital status and number

and ages of your children, if any. If you are married, please tell us your spouse's occupation, if your spouse is employed outside the home.

MS. DEVILLIER: [173] [1012] Jessie Devillier. I'm a teaching assistant with Jefferson Parish School System. I work with emotionally disturbed children. I have 3 sons, 34, 32, 25. My husband's a lab technician at Alpha Testing in Kenner.

MS. TOUCHARD: My name is Cherie L. Touchard, 1437 Avenue F, Marrero. My husband is a boat builder, and I'm a research – a medical research associate at Ochsner Hospital; and I have 2 children, 10 and 6.

MR. FONTAN: Gerald Fontan. I'm an employment manager. My wife is a computer programmer. I have 3 children, 21, 19, and 16. I live at 3000 Elizabeth in Metairie.

MR. JORDAN: Herric Jordan, 5 children, 39, 37, 35, 33, and 30. My wife is employed at Woolworth, and I'm retired. I live at 549 Patterson Street, Westwego.

MR. WILLIAMS: Mr. Jordan, what are you retired from, sir?

MR. JORDAN: Longshoreman.

MR. CHATELLIER: Michael Chatellier, stationary engineer. I'm married. I live at 3209 Bauvais Street. My wife works for a hardware store, 1 child, 25 years old.

MS. MILLER: [174] [1013] My name is Jennifer Miller. I live at 2511 Metairie Lawn Drive. I'm presently unemployed, and I'm single.

MS. MULVIHILL: My name is JoAnn Mulvihill. I live at 510 East Louisiana State Drive. I am married. My husband is self-employed, specializing in formica tops. I'm a housewife. I have 7 children, ages 40, 38, 36, 34, 32, 26, and 23.

MR. PROVENSAL*: Roland Provencal. I'm employed at Chevron. I live at 1208 Lynnette Drive in Metairie, I'm married and I have 2 daughters, 28 and 30. My wife is employed with a voluntary youth development agency, one of the agencies under the United Way umbrella.

MS. WAITS: My name is Aubranell Waits. I live at 2233 Western Street in Harvey, I'm a registered nurse at West Jefferson Hospital. I have 2 kids, 2 and 8, and I'm separated.

MR. MORVANT: My name is Lloyd Morvant. I'm employed at Continental Grain Elevator as a quality control. I'm married, have 4 kids. My wife works at Internal Revenue. The kids are 35, 32, 29, and 19.

MR. LAWS: My name is Roland B. Laws, Jr. I'm a contractor. My wife is a comptroller for a local bank, I have 3 children, ages 15, [175] [1014] 14, and 7.

MS. KAISER: My name is Julie Kaiser. I live at 1604 Armagh Drive in Marrero. I have 2 – 3 children, a 17 year old, a 12 year old, a 4 year old. I work for MI Drilling Tools. I'm a secretary, and my husband is on disability.

MS. WAPPLER: My name is Joy Wappler. I live at 548 West Marlin Court in Terrytown. My husband is a retired geologist with Mobile Oil. We have 4 children, 36, 29, 27 and 24.

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* [Name misspelled throughout transcript; should be Provencal.]

THE COURT: Please answer the questions that the attorneys ask.

MR. OLINDE: Good afternoon, Ms. Devillier. If this case were to go to the penalty phase, could you consider imposing the death penalty upon Allen Snyder, if you found him guilty of first degree murder?

MS. DEVILLIER: Yes, I could.

MR. OLINDE: Ms. Touchard?

MS. TOUCHARD: Yes.

MR. OLINDE: I have to ask the question for the record. I'm sorry, but later. Could you consider imposing the death penalty on Allen Snyder if you found him guilty of [176] [1015] first degree murder?

MS. TOUCHARD: Yes.

MR. OLINDE: Can you pronounce your last name for me, sir?

MR. FONTAN: Fontan.

MR. OLINDE: Mr. Fontan, if you found Allen Snyder guilty of first degree murder, could you consider the imposition of the death penalty upon him?

MR. FONTAN: Yes, I could.

MR. OLINDE: Mr. Jordan, if you found him guilty of first degree murder, could you consider personally imposing the death penalty upon Allen Snyder?

MR. JORDAN: No, I could not.

MR. OLINDE: Is that based upon a longstanding religious, moral, or personal belief that you hold, sir?

MR. JORDAN: I just believe in Thou Shalt Not Kill.

MR. OLINDE: Is there anything that you might hear that would change your belief that Thou –

MR. JORDAN: No. I'd still say the same thing. Life, yes, but death, no.

[177] [1016] MR. OLINDE: Thank you for your honesty, sir.

Mr. Chatellier, if you found Allen Snyder guilty of first degree murder, could you consider imposing the death penalty upon him?

MR. CHATELLIER: Yes.

MR. OLINDE: Ms. Miller, if you found Allen Snyder guilty of first degree murder, could you consider imposing the death penalty upon him?

MS. MILLER: Yes.

MR. OLINDE: Ms. Mulvahill, if you found Allen Snyder guilty of first degree murder, could you consider imposing the death penalty upon him?

MS. MULVIHILL: Yes, I could.

MR. OLINDE: Mr. Provensal, if you found Allen Snyder guilty of first degree murder, could you consider imposing the death penalty upon him?

MR. PROVENSAL: Yes, I could, and the name is Provensal.

MR. OLINDE: I'm sorry, sir.

Ms. Waits, if you found Allen Snyder guilty of first degree murder, could you [178] [1017] personally consider imposing the death penalty upon him?

MS. WAITS: I couldn't.

MR. OLINDE: Is that based upon a longstanding moral, religious, or personal belief that you hold?

MS. WAITS: Religious belief.

MR. OLINDE: Is there anything anyone can say to change your mind?

MS. WAITS: No.

MR. OLINDE: Are there any facts or circumstances that would cause you to change your mind?

MS. WAITS: I don't believe that that should be held in my hands, another person's life. I couldn't make that decision.

MR. OLINDE: And so the answer is, no, to that question?

MS. WAITS: Yes.

MR. OLINDE: Mr. Morvant, if you found Allen Snyder guilty of first degree murder, could you consider imposing the death penalty upon him?

MR. MORVANT: Yes, I could.

[179] [1018] MR. OLINDE: Is it Mr. Laws? If you found Allen Snyder guilty of first degree murder, could you consider imposing the death penalty upon him?

MR. LAWS: Yes, I could.

MR. OLINDE: Ms. Kaiser, if you found Allen Snyder guilty of first degree murder, could you consider imposing the death penalty upon him?

MS. KAISER: Yes, I could.

MR. OLINDE: Ms. Wepple, I'm sorry –

MS. WAPPLER: Wappler.

MR. OLINDE: Wappler. If you found Allen Snyder guilty of first degree murder, could you consider imposing the death penalty upon him?

MS. WAPPLER: Yes.

MR. OLINDE: Again, I talked earlier this morning about mitigating circumstances, what they mean and what they don't mean. Consider never means believe. Consider means listening to and evaluating. Did everybody hear the hypothetical I gave this morning about the man who had his children and his wife kidnapped and was [180] [1019] pretty much compulsed into killing another human being? That's a – Now, that's an extreme example, I'll give you that, of an extreme mitigating circumstance, and there are plenty – If you're open-minded, there are plenty of possible fact patterns where you can consider that mitigating circumstances might be applicable in the decision between life and death. I could go through a litany of them. If you think about it for a while, you probably could too, but, now that you've heard them, and no one can tell you how much weight you have to give to one mitigating circumstances versus the aggravating circumstances. By finding someone guilty of first degree murder, you found an aggravating circumstance, and you're entitled to impose the death penalty at that point.

You may hear one mitigating circumstance. You may believe it; you may disbelieve it. You may hear eight. You may believe them all and still say, Based upon those mitigating circumstances that I've heard, even though you present eight of them to me, and I've only heard one aggravating circumstance, I still believe, after weighing that process, that the person should get the death penalty.

This isn't a numbers game or a counting game. The only real question is whether or not there are possibilities out there, such as the example that I gave [181] [1020] this morning, to where you could hear that fact pattern and say, In that case, in a case where someone had a situation thrust upon them, and they acted as they acted, they came to trial. They told you the truth, you could give life in that situation or any other fact pattern that you can think of. So please don't think consider means believe or have to apply. It means you'll listen to it fair-mindedly and open-mindedly. You'll listen to it with an open mind and a fair mind, but as far as how much you weigh it against what you hear about this case, that is entirely up to you, and I can't tell you, you have to give them the death penalty, and they can't tell you that you don't have to give them the death penalty. It's your decision.

And I'm going to say the same thing that I said earlier about insanity. Insanity means they have to prove to you that it's – didn't know the difference between right and wrong, not that he's crazy, not that he's insane, that he is insane and he doesn't know the difference between right and wrong.

Ms. Devillier, I'm going to ask you these questions at the same time so we can go through this: You feel you

understand what the penalty phase is about and listening and evaluating mitigating circumstances?

MS. DEVILLIER: [182] [1021] Yes.

MR. OLINDE: Can you do that?

MS. DEVILLIER: Yes.

MR. OLINDE: Would you listen to the evidence before you made your mind up, both on that issue and on the defense of insanity?

MS. DEVILLIER: I don't know what happened. I'd have to weigh and put some credit to if he meant to do it, or he just got out of hand or – I'd have to weigh that, myself.

MR. OLINDE: Right. You'd have to listen to the evidence.

MS. DEVILLIER: Yes.

MR. OLINDE: Okay.

Ms. Touchard, would you listen to the evidence on issues of insanity and on issues of mitigating circumstance before you made your mind up?

MS. TOUCHARD: On mitigating circumstances, as far as life and death, I have no problem.

MR. OLINDE: Okay.

MS. TOUCHARD: But I do have a problem with the plea for not guilty and not guilty by reason of insanity. I mean, if he is insane and [183] [1022] he's not guilty because he's insane, then why doesn't that plea alone

stand; whereas, you've got this other plea of not guilty thrown in and –

MR. OLINDE: You may see a logical inconsistency in the way that the case is pled, but really, it's the lawyers' decision to do that as far as to how the case is pled, and what they're basically saying is, We want to be able to urge that defense, not guilty by reason of insanity. Again, you don't know what kind of scientific evidence or factual evidence you're going to hear until the case comes down.

They're allowed to take two bites at the apple, and basically, we've got to prove our case. We've got to show you that Allen Snyder committed first degree murder.

MS. TOUCHARD: Right.

MR. OLINDE: That's our job. We have to do that. And if you find that we did do that, than you know that he did it, and then the question would become whether or not he could not appreciate the difference between right and wrong and you'd have to listen to the evidence, consider it, evaluate it, accept it or reject it. Could you do that?

MS. TOUCHARD: Yes, I could if –

[184] [1023] MR. OLINDE: Okay.

MS. TOUCHARD: – if you proved that he was guilty, then I could listen to the insanity.

MR. OLINDE: Basically, they're saying, We want you to prove your case.

MS. TOUCHARD: Okay.

MR. OLINDE: That when they say not guilty, We want you to prove your case. We want you to prove that he did it. They're entitled to do that.

MS. TOUCHARD: Okay.

MR. OLINDE: Sir, could you listen to all the evidence in the penalty phase before making your mind up on whether to impose the death penalty or not?

MR. FONTAN: Yes. That's what we're supposed to do.

MR. OLINDE: Same thing with the insanity defense? Is that a yes? I need a –

MR. FONTAN: Yes.

MR. OLINDE: And, sir, I'm going to skip over you, considering your feelings on the death penalty. Don't hold that against me.

[185] [1024] Mr. Chatellain, –

MR. CHATELLIER: Chatellier. A lot of Chatellains out there. There's only a few of us.

MR. OLINDE: All right.

MR. CHATELLIER: It's close.

MR. OLINDE: I got you. I know you can anticipate the questions I'm going to ask and you answer them. Can you listen to all the evidence before making your mind up on the penalty phase and see what kind of case this is?

MR. CHATELLIER: Yes, sir.

MR. OLINDE: And on the issue of insanity, can you hold them to their burden of proof, listen to what's said, make them say the difference between right and wrong, evaluate it as – Listen to it open-mindedly and accept it or reject it. Can you do that?

MR. CHATELLIER: Yes, sir.

MR. OLINDE: Ms. Miller, can you do those two things that we've talked about?

MS. MILLER: I can listen to the evidence, but if he were proven guilty, then I could not give life imprisonment.

[186] [1025] MR. OLINDE: Okay. Did you hear the example I gave earlier this morning about the person thrust into that situation?

MS. MILLER: I just feel that if you take a person's life then you should get what you have done to that person.

MR. OLINDE: And so, even with the example I gave this morning, you could not – You would give that person the death penalty for going out and killing that guy to save his wife and kids? You would give that person the death penalty?

MS. MILLER: I would think that would be under different circumstances, but –

MR. OLINDE: If that were first degree murder, he killed the State's witness, would you give that person the death penalty?

MS. MILLER: I would –

MR. OLINDE: He'd still get life. You'd give him the death penalty?

MS. MILLER: Yes.

MR. OLINDE: Okay. Fair enough. I won't ask you anymore questions.

Ms. Mulvihill, could you listen to all the evidence and decide what kind of case [187] [1026] of it before –

MS. MULVIHILL: Yes, sir.

MR. OLINDE: Could you listen to the evidence on the insanity plea –

MS. MULVIHILL: Yes.

MR. OLINDE: – and hold them to their burden of proof?

MS. MULVIHILL: Yes, sir.

MR. OLINDE: Sir, can you do those two things?

MR. PROVENSAL: Yes, sir.

MR. OLINDE: Mr. Morvant, can you do those two things?

MR. MORVANT: Yes, sir.

MR. OLINDE: Mr. Laws, is it?

MR. LAWS: The insanity portion, I have no problem with. The example you gave, and maybe I misunderstand the law a little bit, but in the scenario you discussed earlier about the man, you know, and all of the that –

MR. OLINDE: Right.

MR. LAWS: [188] [1027] – to me, I would not find him guilty of first degree murder. It would be reduced to manslaughter, in my perception of the law –

MR. OLINDE: You –

MR. LAWS: – because I couldn't convict him under the scenario you gave, but if I found someone guilty of first degree murder, I would have a – If I found him truly guilty of first degree murder, I would have one heck of a time not giving him the death penalty.

MR. OLINDE: And I understand what you're saying. The example I give is one because there are an infinite number of examples that could be first degree murder, and the law isn't whether you lean towards giving the death penalty or don't lean towards – lean towards life imprisonment, it's only a question of whether you would listen to evidence, consider it, and no one can tell you how to weigh the factors of the evidence you hear. But what I'm saying is: The law in Louisiana for compulsion is an absolute defense to any other crime but murder. If that crime were armed robbery, your verdict would actually be not guilty. To a murder, you cannot use compulsion as a defense, and if it's a State witness or there is an aggravating circumstance that applies, the law is [189] [1028] first degree murder.

MR. LAWS: Right.

MR. OLINDE: And that's what it is. Now, if it were 30 minutes, you could say, – you could justify a manslaughter as well under those facts or circumstances, but you could also justify a first degree murder, depending on the amount of time that he had to cool off and the provocation involved.

MR. LAWS: From the defense attorney's – When she was bringing up the subject of mitigating circumstances, she was talking about after a rendering of first degree murder was done, and then we went into the penalty phase or whatever it's called, or the next trial, where she's brought up his parents or whoever. That is what I'm talking about as far as mitigating circumstances would have no credence with me whatsoever.

MR. OLINDE: But you see, –

MR. LAWS: But the thing that you're talking about, as I understand, in the process of trying the case, would come out in the trial and would not – In the scenario you were talking about, like I said, I would find the guy probably reduced from first degree murder down to manslaughter or [190] [1029] something else in the scenario you broached to me.

MR. OLINDE: There are – And I will use one example because there's an infinite number of examples out there. But the only thing that I have to say is as far as someone's childhood, their upbringing, a good neighbor, whatever, we don't know what evidence they're going to bring up here, and you can't decide, hey, these are what – If this is a mitigating evidence, yea or nay. You've got to listen to the evidence and evaluate it. There's no way to make a call ahead of time without listening, listening to it and evaluating it. And really, the bottom-line question, I'll get to the bottom line. Whether my example's good or not, could you conceive of any hypothetical possibilities where someone would be convicted of first degree murder and you would impose – potentially impose a verdict of life instead of death? And I won't berate you any further about it. In going to leave it at that.

MR. LAWS: I can only honestly say that I would listen to any evidence presented to me and make the best judgment I could, but I can't really think of anything, once I convicted someone of first degree murder, where I would not give them the death penalty.

MR. OLINDE: [191] [1030] Is it possible –

MR. LAWS: And honestly, –

MR. OLINDE: And the only follow-up question is: Is it possible or is it not possible?

MR. LAWS: Anything's possible. I mean, sure, it's possible, I'm sure. But I – You asked me the question can I think of anything? I cannot.

MR. OLINDE: Thank you, sir, for honestly answering that for me.

Ms. Kaiser?

MS. KAISER: There's too many questions.

MR. OLINDE: Could you listen in the penalty phase, if you found him guilty of first degree murder, to aggravating circumstances and to mitigating circumstances, weigh them however you felt you were going to weigh them and make your decision on life or death by what you heard on the evidence? That's the question. Or are you automatically death, no matter what you hear?

MS. KAISER: If I decided that he was guilty of first degree murder –

MR. OLINDE: Under what the law says first degree murder is and the –

[192] [1031] MS. KAISER: – under what the law says first degree murder is –

MR. OLINDE: – extreme – Okay.

MS. KAISER: – then I would find him – if he was guilty, then I would vote for the death penalty.

MR. OLINDE: Automatically?

MS. KAISER: Yes.

MR. OLINDE: Ms. Wappler?

MS. WAPPLER: I feel very much the same way. I could listen but if we do find first degree, then I would have difficulty with the insanity plea.

(Court Reporter requests Ms. Wappler to speak up.)

MS. WAPPLER: The insanity plea I'd have difficulty with.

MR. OLINDE: Okay. There are no circumstances or mitigating circumstances you could envision that someone could bring to you that would cause you to even think about giving someone life imprisonment? And you don't know the facts of the murder –

MS. WAPPLER: Well, very much just like I said but [193] [1032] if I could come up with a first degree charge, I think I could have to – At this particular point in time decide the death penalty.

MR. OLINDE: So you don't believe in insanity or mitigating or aggravating circumstances?

MS. WAPPLER: Not really, no.

MR. OLINDE: Thank you for your honesty.

Everybody comfortable with the law on manslaughter as they heard it, as defined by Ms. DaPonte and Mr. Williams and myself already? Anybody have any problems with that?

Anybody have any problems applying the law of manslaughter if they believed that it applied in this particular case or any case?

Anybody have any problems presuming Allen Snyder innocent at this point and having him start off with a clean slate?

Does anybody have any problems not requiring Allen Snyder to testify, if he so chooses not to and not holding that against him, basically making us prove our case beyond a reasonable doubt? Does anybody have a problem with that?

Does anyone think that he's guilty if he doesn't testify, anybody?

Anybody have any prior jury service? Ms. Devillier?

MS. DEVILLIER: [194] [1033] It was a civil case in the Federal Court.

MR. OLINDE: Okay. Did the plaintiff or the defendant win?

MS. DEVILLIER: Uh –

MR. OLINDE: Did anybody get any money?

MS. DEVILLIER: We didn't award any.

MR. OLINDE: Okay. And who else had their hands up? I'm sorry. Sir?

MR. FONTAN: Criminal.

MR. OLINDE: And how –

MR. FONTAN: About four years ago.

MR. OLINDE: Okay. And what kind of case was that?

MR. FONTAN: A murder, second degree.

MR. OLINDE: Okay. In second degree murder, there's only one penalty, which is life imprisonment. Did the jury return a verdict in that case?

MR. FONTAN: Yes.

MR. OLINDE: And what was the verdict of the jury?

MR. FONTAN: [195] [1034] Guilty.

MR. OLINDE: Were you the foreman of that case?

MR. FONTAN: No.

MR. OLINDE: Sir?

MR. CHATELLIER: About three times, so far.

MR. OLINDE: Okay.

MR. CHATELLIER: Two of them here in Jefferson Parish. They were minor cases. The guy rear-ends an automobile. He's up for –

MR. OLINDE: We can skip that one.

MR. CHATELLIER: No? Another one for pandering.

MR. OLINDE: Okay.

MR. CHATELLIER: And a third one in Federal Court right over here on Poydras.

MR. OLINDE: Was that a civil or a criminal case?

MR. CHATELLIER: I think they would call it a civil. He was suing the State of Louisiana –

MR. OLINDE: That's a civil case.

MR. CHATELLIER: Civil.

MR. OLINDE: [196] [1035] All right. You said there was one for pandering; that was a criminal case. And did the jury return –

MR. CHATELLIER: It was thrown out. They couldn't prove their point.

MR. OLINDE: So you all voted not guilty?

MR. CHATELLIER: Not guilty.

MR. OLINDE: I can't honestly say I've ever done a pandering case.

MR. CHATELLIER: It's interesting, to say the least.

MR. OLINDE: Okay.

How about in the back row? All right, sir?

MR. MORVANT: Federal Court, twice.

MR. OLINDE: Okay.

MR. MORVANT: Civil, one contract versus another, and a Workman's Comp. case.

MR. OLINDE: Okay. And did anyone get any money in either one of those cases?

MR. MORVANT: No.

MR. OLINDE: Sir?

MR. LAWS: [197] [1036] Mine was all military. I was a commander at a post, USMJ Article 15 and Article 31, Court Martials.

MR. OLINDE: Okay. And about how many juries did you sit on?

MR. LAWS: Two.

MR. OLINDE: Okay. And do you remember what kind of cases they were?

MR. LAWS: Both were drug cases.

MR. OLINDE: And do you recall what the decision of the Military Tribunal was in those cases?

MR. LAWS: Guilty.

MR. OLINDE: What branch of the military were you in, sir?

MR. LAWS: Army Corps of Engineers, combat.

MR. OLINDE: Anybody else? Okay.

Anybody have any questions?

Thank you very much.

MS. DaPONTE: Does anybody else have any military experience? Mr. Fontan?

MR. FONTAN: Navy.

MS. DaPONTE: Navy. And how long was that?

[198] [1037] MR. FONTAN: Four years.

MS. DaPONTE: Okay.

MR. CHATELLIER: Same way.

MS. DaPONTE: Navy, four years?

MR. CHATELLIER: Navy, four years.

MS. DaPONTE: Is that all for the front row?

Okay, back row. Mr. Morvant?

MR. MORVANT: Two years with the Marine Corps Reserves, active duty.

MS. DaPONTE: Okay.

And, Mr. Provensal?

MR. PROVENSAL: Eight years in the National Guard.

MS. DaPONTE: Anybody else? Yes?

A PROSPECTIVE JUROR: I was Army.

MS. DaPONTE: Right. I figured that. We got that. Anybody else?

MS. WAITS: Army National Guards.

MS. DaPONTE: Okay.

We touched on the issue – Well, actually, we didn't on the first round.

[199] [1038] Y'all heard what we said about domestic violence and the fact that there will be some instances alleged, and the State can use those instances in order to prove, as Mr. Williams illustrated, an element of the crime, intent, and also something they don't have to prove, which is motive. If that evidence comes in, is there anyone who feels that it's going to be so inflammatory that they would consider that evidence as evidence of guilt rather than as evidence of proof of an element? Ma'am?

MS. DEVILLIER: No.

MS. DaPONTE: I guess my question is better put: Would you find him guilty – Would you find Mr. Snyder guilty of the charge of murder simply based on what they show you about the domestic violence issue?

MS. DEVILLIER: No.

MS. DaPONTE: Okay.

Ms. Touchard?

MS. TOUCHARD: No.

MS. DaPONTE: Mr. Fontan?

MR. FONTAN: No.

MS. DaPONTE: Mr. Chatellier?

[200] [1039] MR. CHATELLIER: Chatellier.

MS. DaPONTE: Chatellier.

MR. CHATELLIER: Got to share in the little tale in the layer in the cake. (Written phonetically.) Close enough.

MS. DaPONTE: Okay.

MR. CHATELLIER: No.

MS. DaPONTE: I didn't –

MR. CHATELLIER: I don't think I'd have any problem with that.

MS. DaPONTE: Okay.

Ms. Kaiser?

MS. KAISER: I would have a problem with that.

MS. DaPONTE: All right. Do you think that it would – Okay. Thank you.

Mr. Morvant?

MR. MORVANT: Well, I had a nephew who was killed by a live-in girlfriend, that was a while ago, but I don't think – I mean, I don't think it – it affected the way that lady did this. It's a hard thing.

MS. DaPONTE: I appreciate your giving me that [201] [1040] information, but you feel like you could – Do you feel like that you could still listen to the evidence –

MR. MORVANT: I think so.

MS. DaPONTE: – even after hearing about the domestic violence, you could still listen to the evidence about whether Mr. Snyder was guilty?

MR. MORVANT: Yes.

MS. DaPONTE: Okay.

And, Mr. Laws, how about you?

MR. LAWS: I could.

MS. DaPONTE: Mr. Provensal?

MR. PROVENSAL: You're addressing domestic violence only?

MS. DaPONTE: Yes, sir. At this moment – Is there something else that you wanted to tell me?

MR. PROVENSAL: Possibly.

MS. DaPONTE: Let's do the domestic violence first. If that evidence came forth, the State would be using it, and the Judge would instruct you at the time that it came in and then he'd instruct you later, that the only thing you could use it for was what [202] [1041] it was offered for, and in this circumstance, it would be offered for motive and intent. You couldn't find Mr. Snyder guilty of the crime charged, the crime of murder, simply based on the evidence of domestic violence. Would you be able to follow that instruction?

MR. PROVENSAL: Yes.

MS. DaPONTE: Was there something else that you thought I might need to know?

MR. PROVENSAL: It may come about later, and I can just wait until then, but it's something I would not want to bring up in this setting.

MS. DaPONTE: I understand.

Ms. Mulvihill, the question about domestic violence.

MS. MULVIHILL: I would have no problem.

MS. DaPONTE: You could listen and be fair?

MS. MULVIHILL: Yes.

MS. DaPONTE: Okay.

Mr. Fontan, do you think that someone should have to testify in a criminal case?

MR. FONTAN: No.

MS. DaPONTE: [203] [1042] How about you? Mr. Provensal, do you feel that someone should have to testify in a criminal case?

MR. PROVENSAL: No.

MS. DaPONTE: How about you, ma'am?

MS. DEVILLIER: No. I would imagine that's what he has you for, if I – to talk for me, if I were in this situation.

MS. DaPONTE: Ms. Mulvihill, how about you? Do you feel like somebody should get up on the witness stand and testify if they're accused of a crime?

MS. MULVIHILL: No.

MS. DaPONTE: How about you, sir?

MR. MORVANT: It would be nice if he would, but the law is the law.

MS. DaPONTE: And you could follow the law and not require that?

Mr. Laws?

MR. LAWS: I have no problem with it.

MS. DaPONTE: Sir?

MR. CHATELLIER: I think I'm about like the man says: It would be nice if he would, but it's not [204] [1043] required.

MS. DaPONTE: Okay. Would you evaluate the evidence differently? In other words, if the State –

MR. CHATELLIER: It leaves an awful gray area.

MS. DaPONTE: It does. And if you're left with a gray area after the State's case, do you understand that that gray area, that's – It is what it is. It's gray, and if you need questions answered, you can't turn to Mr. Snyder for those answers. Do you understand?

MR. CHATELLIER: I know what we're saying.

MS. DaPONTE: Okay. And would you be able to follow that?

MR. CHATELLIER: I guess so.

MS. DaPONTE: I think that's all I have. Mr. Vasquez has some questions for you.

Mr. Provensal, would you mind approaching the bench with the Judge?

Oh, I'm sorry.

MS. TOUCHARD: Maybe I should let you know that I have a brother-in-law who was murdered and –

MS. DaPONTE: I'm glad you did let us know that, Ms. [205] [1044] Touchard, and I'm not going to leave yet, now that Ms. Touchard mentioned that.

How long ago was that, Ms. Touchard?

MS. TOUCHARD: It was seven years ago.

MS. DaPONTE: Where did that happen?

MS. TOUCHARD: It happened on the Westbank, in Marrero, on the Expressway, near Westwood Drive.

MS. DaPONTE: Would that instance in your life, that experience that you've had, do you think that that might affect your ability to be fair on this case?

MS. TOUCHARD: I'd – I would want to say, no, but, you know, I really don't know.

MS. DaPONTE: Let me see if I can ask it a different way. Do you think that if at the end of the case it was a close case. In other words, – When we talk about the burden of proof that the State has, it's a big, big burden.

MS. TOUCHARD: Right.

MS. DaPONTE: So, if we're talking about a close case, we could be talking about a 50/50 shot, or we could be talking about, maybe, 60/40. If it's 60 percent for the State and 40 percent for the Defense, that may [206] [1045] not satisfy somebody's definition of proof beyond a reasonable doubt. In a close case, given your experience, do you think that you might tend to give the State a boost because of your –

MS. TOUCHARD: It – It might, you know. It – I guess it would depend on how I felt emotionally after it was over.

MS. DaPONTE: Okay. And let me ask you this: Ms. Touchard, do you feel that what has happened might, – may cause you to make a decision based on emotion rather than on intellect?

MS. TOUCHARD: Um, I would hope not, but –

MS. DaPONTE: If you could be just as honest with me as you could. If you – You heard what I've been saying all day yesterday and all day today?

MS. TOUCHARD: Right.

MS. DaPONTE: The job of a juror has to be to decide things absolutely –

MS. TOUCHARD: Right.

MS. DaPONTE: – devoid of any emotion whatever.

MS. TOUCHARD: I could – I could try.

MS. DaPONTE: [207] [1046] I understand, and I appreciate your offer to try, but what I have to ask you is: Do you think you could? Not do you think you could try, but do you think you could divorce yourself of all emotion and be totally intellectual, given what you have been through?

MS. TOUCHARD: I'm – I'm not really sure that I could do it completely. I mean, it would just depend on how I felt afterwards.

MS. DaPONTE: And I appreciate your telling us that. Thank you, Ms. Touchard.

And is there anyone – And, Ms. Touchard, thank you so much for telling me that. Is there anybody else that has anything that I need to know about?

MR. PROVENSAL: Well, – Up here.

I've known three people who have been murdered.

MS. DaPONTE: You have? Is that what you were talking about?

MR. PROVENSAL: No. There's something else.

MS. DaPONTE: That's okay.

MR. PROVENSAL: Two co-workers and the spouse of a co-worker.

MS. DaPONTE: Did that happen – I hesitate to ask [208] [1047] this, Mr. Provensal, but was that three separate instances or –

MR. PROVENSAL: Three separate instances –

MS. DaPONTE: Okay.

MR. PROVENSAL: – over a span of years.

MS. DaPONTE: Over a span of years. And I will ask you the same question that I asked Ms. Touchard. Given those experiences, do you think that you could be fair in this case?

MR. PROVENSAL: I don't think so. I've never been able to put that out of my mind.

MS. DaPONTE: Thank you.

And I'm not going to ask you to come up to the bench with us. Thank you.

MR. VASQUEZ: Good afternoon. I'll try to be brief, as I hope I have been all day today, anyway.

I want to take everybody back now – Rather, forward. We're in the death penalty now, in the sentencing phase and we're deciding life versus death.

Mr. Fontan, if I present certain evidence regarding the fact that Mr. Snyder was devoted to his children, and he supported them, and he worked as hard as he could for them, is that something that you could consider in mitigation of a life [209] [1048] sentence?

MR. FONTAN: I think all the mitigation has to be considered.

MR. VASQUEZ: Okay. Do you feel that you could seriously consider it, give it your full time and attention and keep an open mind –

MR. FONTAN: Yes.

MR. VASQUEZ: – assuming you found Mr. Snyder guilty of first degree murder?

MR. FONTAN: Yes, I could.

MR. VASQUEZ: Okay.

Ms. Touchard, what about you with that question?

MS. TOUCHARD: The mitigating –

MR. VASQUEZ: Could you consider it, yes –

MS. TOUCHARD: Yes.

MR. VASQUEZ: – mitigating circumstances?

MS. TOUCHARD: Yes.

MR. VASQUEZ: You would not be so predisposed that you would exclude that and only vote for the death penalty?

MS. TOUCHARD: [210] [1049] No.

MR. VASQUEZ: Mr. Chatellier, –

MR. CHATELLIER: Chatellier.

MR. VASQUEZ: – let me ask you your opinion on something. Do you feel that life imprisonment is a waste of the taxpayers' dollars?

MR. WILLIAMS: Objection. That's irrelevant. I couldn't ask something like that; so, why should he be able to ask it. It's irrelevant.

MR. VASQUEZ: It's totally relevant, Your Honor.

MR. WILLIAMS: It's irrelevant.

MR. OLINDE: It's not a mitigating circumstance.

MR. VASQUEZ: I'm entitled to inquire as to the potential juror's opinion regarding life imprisonment and the death penalty.

MR. WILLIAMS: Well, Judge, that's not a –

MR. VASQUEZ: I've asked him –

MR. WILLIAMS: – mitigating circumstance. It's –

MR. VASQUEZ: So, what? I agree it's not, but I'm entitled to ask it.

[211] [1050] THE COURT: Okay. I'm going to overrule the objection.

MR. VASQUEZ: Thank you.

And I don't mean to offend you, and I'm not picking on you. I'm just asking.

MR. CHATELLIER: I agree. I'm not taking it as an offense –

MR. VASQUEZ: Okay.

MR. CHATELLIER: – or anything, but I – Can I go a little bit out of my way? I've got a number of police officers in my family, and I've seen some things that have happened with people who have gone into a prison and have come out even harder than when they went in.

MR. VASQUEZ: Okay.

MR. CHATELLIER: And I find that one kind of rough.

MR. VASQUEZ: How would that affect your ability to – Or would it affect your ability to consider mitigating circumstances and consider –

MR. CHATELLIER: I'm afraid it may.

MR. VASQUEZ: I'm sorry?

MR. CHATELLIER: [212] [1051] I'm afraid it may.

MR. VASQUEZ: To the extent where you'd be so predisposed that you could not consider, in your mind, any mitigating circumstances that I could present?

MR. CHATELLIER: I'd hate to put a man's life on the line for that, as to whether I would or wouldn't lean one way or the other.

MR. VASQUEZ: Okay. I'm not sure I'm following you, and maybe I'm the only one not following you, and I'm sorry about that.

MR. CHATELLIER: It may affect my judgement.

MR. VASQUEZ: Okay. The fact that you know many police officers and you've seen some people go in.

MR. CHATELLIER: Not know them. I'm related to them.

MR. VASQUEZ: You're related to them, okay. Are you related as a brother, father?

MR. CHATELLIER: Two cousins, a brother-in-law, and a uncle.

MR. VASQUEZ: Okay. And are they still police officers?

MR. CHATELLIER: One of them, I think, has gotten out of the business.

[213] [1052] MR. VASQUEZ: Okay.

MR. CHATELLIER: He's retired.

MR. VASQUEZ: All right. And where are they officers, Jefferson Parish or –

MR. CHATELLIER: One on the North –

MR. VASQUEZ: I'm sorry.

MR. CHATELLIER: One on the Northshore, one here, one in Alabama.

MR. VASQUEZ: Mr. Morvant, let me ask you the same question. Do you believe that life imprisonment is a waste of the taxpayers' dollars?

MR. MORVANT: That's a rough question.

MR. VASQUEZ: Very rough question, and I'm sorry I have to ask it –

MR. MORVANT: Yeah, it's going to be a –

MR. VASQUEZ: – but I do because we're talking about a man's life here.

MR. MORVANT: I agree.

MR. VASQUEZ: And I'm not trying to ambush anybody, but I need to find out what y'all's [214] [1053] opinions are on this subject.

MR. MORVANT: An eye for an eye, a tooth for a tooth. If someone kills someone, I'd have to hear the whole story, all the evidence against a murderer, you know, dropping out to life or the death penalty. He'd have to have some real good evidence.

MR. VASQUEZ: You say an eye for eye, a quote from the Bible?

MR. MORVANT: Yes.

MR. VASQUEZ: Okay. An eye for an eye basically implies that if you find him guilty of first degree murder, –

MR. MORVANT: He goes –

MR. VASQUEZ: – then his life should be taken.

MR. MORVANT: Right. Right.

MR. VASQUEZ: Okay. So, it is your position, I'm not telling you, I'm asking you, is your position –

MR. MORVANT: The only – I'm saying that I'll abide by the law, and if I hear all the evidence and if it's – it should be presented, it could be presented, but it would be difficult to come from murder one to life, you know?

[215] [1054] MR. VASQUEZ: If I stand up here at the end of the case and ask you to have mercy upon Allen Snyder, to think about anything in his background that I may introduce at the penalty phase, is that something that you could consider?

MR. MORVANT: If I had any mercy, I wouldn't be sitting up there right now. I believe there's – If you kill someone, you know – Don't do the crime if you can't do the time.

MR. VASQUEZ: You know, I appreciate your honesty on that, and I appreciate your –

MR. MORVANT: Well, if he's proven not to kill someone or whatever, that's different, you know?

MR. VASQUEZ: Well, then, we're not talking about a penalty phase. Everybody goes home.

Ms. Mulvihill, is it?

MS. MULVIHILL: Yes, it is.

MR. VASQUEZ: Same question to you, ma'am, regarding life imprisonment. Do you believe that's a waste of the taxpayers' dollar?

MS. MULVIHILL: No, I don't think so.

MR. VASQUEZ: okay. You believe that life [216] [1055] imprisonment is a serious punishment?

MS. MULVAHIILL [sic]: I'd have to really listen to the entire case of what's actually going on, and like y'all say, weigh it, then make a decision. Of course, you can't really say.

MR. VASQUEZ: So, if I present certain things that the law allows me to present regarding Allen Snyder's background or his circumstances, what you're telling me is you would keep an open mind –

MS. MULVIHILL: Yes, I'd consider it.

MR. VASQUEZ: – and consider it. You would not automatically say, He killed somebody. He deserves to die.

Let me ask you, Mr. Fontan, not to pick on you, that question: Do you feel that life imprisonment is a waste of the taxpayers' dollars, or do you feel that perhaps it's –

MR. FONTAN: I don't think the taxpayers' dollars should have anything to do with it.

MR. VASQUEZ: You don't feel that should come into play at all?

MR. FONTAN: No.

MR. VASQUEZ: Is your opinion that life imprisonment [217] [1056] is a serious punishment?

MR. FONTAN: Yes.

MR. VASQUEZ: Ms. Touchard, –

MS. TOUCHARD: Yes.

MR. VASQUEZ: – same question.

Mr. Jordan, if you were selected to sit on this jury and the Judge told you what the law was and said that you must follow the law, that you must consider both life imprisonment and the death penalty, do you think that you could put aside your beliefs and follow the Judge's instructions?

MR. JORDAN: If it was life, yes, not death.

MR. VASQUEZ: Well, if you're in the penalty phase and you're only deciding between life and death, and the Judge says, You shall consider both aggravating circumstances or death penalty and mitigating circumstances or life imprisonment.

MR. JORDAN: Life imprisonment.

MR. VASQUEZ: Okay. So what I'm hearing is you could not consider the Judge's instructions.

Ms. Waits, is it?

MS. WAITS: [218] [1057] Yes.

MR. VASQUEZ: Same sort of question to you. Let's say you've been selected and the Judge says, You shall, which means you – The law says you will consider aggravators and mitigators, and you shall decide between death and life, can you put aside your beliefs to the extent where you could follow the Judge's law and if the aggravators were sufficient to warrant a death penalty, you could impose the death penalty?

MS. WAITS: No, I couldn't.

MR. VASQUEZ: You could not do that? Under no circumstances?

Just one moment, please.

Mr. Chatellier, I just need to get a clarification. If I present certain mitigators to you, could you consider them in deciding a life? I've heard what your opinion is regarding life imprisonment.

MR. CHATELLIER: I'd say, yes.

MR. VASQUEZ: Thank y'all for y'all's attention.

MR. WILLIAMS: Your Honor, I'd ask the Court's permission to traverse two of the witnesses very briefly.

Mr. Provensal and Ms. Touchard, I just want to do a follow-up question and make[219] [1058] sure that we understand. Nothing can undo what's happened to your brother-in-law and your three friends. The question would be here that obviously, you're here about a murder case, and your memories can never be erased, but the bottom line is would you convict this man over here (indicating) because of what happened to your three friends and your brother-in-law? In other words, would that – Do you feel that you're going to be able to obtain a measure of revenge if you were able to sit on a jury here, to what happened to your three friends and your brother-in-law by convicting this man right here (indicating)?

Ms. Touchard?

MS. TOUCHARD: No, I wouldn't be looking for revenge.

MR. WILLIAMS: Okay.

MS. TOUCHARD: But with what has happened, carries some emotion and so, you know, emotions do come into play. You never know – I feel like people never really know how they're going to act about certain situations until they're actually put in that situation.

MR. WILLIAMS: But let me see if I understand it. First off, now, we're talking about the case in chief.

MS. TOUCHARD: [220] [1059] Right.

MR. WILLIAMS: We're not talking about the death penalty phase.

MS. TOUCHARD: Okay.

MR. WILLIAMS: We have to prove all –

MS. TOUCHARD: Right.

MR. WILLIAMS: – of the things that you know we have to prove. If we prove that, they may or may not urge an insanity defense.

MS. TOUCHARD: Okay.

MR. WILLIAMS: Now, would, and I'm not trying to make light of the tragedy that's in your life at all, but do you feel that that would so cloud your reasoning that you couldn't listen to the evidence in this case?

MS. TOUCHARD: I would – I would hope it would not.

MR. WILLIAMS: Okay. In other words, the best we can ever ask you to do and, Mr. Provensal, you too, sir, is to do the best that you can.

MS. TOUCHARD: Uh-huh (Affirmative reply.)

MR. WILLIAMS: And I think you understand where I'm coming from –

MS. TOUCHARD: [221] [1060] Right.

MR. WILLIAMS: – and that is, that if the tragedy in your life is going to spill over into this case, then obviously, you can't sit as a juror.

MS. TOUCHARD: Uh-huh (affirmative reply).

MR. WILLIAMS: But if you feel that you would follow the law that you're given in this case and do the best you could to decide this case on the facts – You don't think that this gentleman here had anything to do in your case, do you?

MS. TOUCHARD: Oh, no. I don't think –

MR. WILLIAMS: And the same thing, –

MS. TOUCHARD: – I mean, I don't think so.

MR. WILLIAMS: – Mr. Provensal?

MR. PROVENSAL: No.

MR. WILLIAMS: And if, you know, because everybody, nobody, for goodness sakes, like today, when I'm coming to work and I know probably with all of you all listening on the radio, you hear about that terrible crime where that 11-month-old child is killed in New Orleans. It makes you want to cry when you hear something like that.

[222] [1061] And now, you're hearing about another murder case, and when you hear that, you know, you may be thinking about that when you're here. But, obviously, if you're picked as a juror, you have to be able to let us know that, you know, it's a terrible, cruel world, but I'm going to

decide this case on the evidence that I hear in this courtroom.

Could you do that, Ms. Touchard?

MS. TOUCHARD I would certainly try.

MR. WILLIAMS: Mr. Provensal, same question to you, sir?

MR. PROVENSAL: I don't think I could do that.

MR. WILLIAMS: I respect that, sir.

Now, real quickly, Mr. Laws, I want to make sure, if you are selected as a juror in this case, you've indicated you're leaning toward the death penalty.

All right. If we got into the penalty phase – I beg your pardon – If you believe that the State proved its case beyond a reasonable doubt, and we get in the penalty phase, which I believe you said you're leaning toward the death penalty, could you consider – could you, – just like I told the other group, like Mr. Olinde did first thing this morning, – Could you listen, consider, and then accept or reject mitigating evidence put [223] [1062] on by the defense?

MR. LAWS: Yes.

MR. WILLIAMS: Mr. Morvant, same question to you, sir. If this case proceeded into the penalty phase, which would mean that you've already found the defendant Allen Snyder guilty of first degree murder. In the penalty phase, it's a whole other decision to be made, a whole other trial. The State puts on evidence and the defense can put on evidence that they will try to use to convince you that you should spare his life. Could you

listen to that evidence, consider that evidence, and then accept or reject it?

MR. MORVANT: Have to prove guilty of murder one –

MR. WILLIAMS: Yes, sir.

MR. MORVANT: – in the penalty phase?

MR. WILLIAMS: Yes, sir.

MR. MORVANT: I think I could if enough evidence was presented.

MR. WILLIAMS: Thank you.

(The following is heard outside the hearing of the prospective jurors.)

THE COURT: All right. Challenges for cause?

[224] [1063] MR. WILLIAMS: The State will now use a challenge for Mr. Jordan for inability to consider the death penalty.

THE COURT: Granted.

MR. WILLIAMS: Ms. Aubranell Waits for inability to consider the death penalty.

THE COURT: Granted.

MR. WILLIAMS: And that's all.

MS. DaPONTE: Judge, the Defense wishes to challenge Ms. Touchard. She never got to the point where she could say she would be able to be fair. She always said she would try, and I don't think that's enough.

MR. WILLIAMS: Yes, it is. Yes, it is.

MS. DaPONTE: She has to be able to say that she could be and she would be. All she said was, "I would certainly try."

MR. WILLIAMS: No objection.

MS. DaPONTE: We would move to excuse Jennifer Miller –

THE LAW CLERK: For cause?

MS. DaPONTE: – for cause.

[225] [1064] THE COURT: All right. I will grant this exception of Ms. Touchard.

MS. DaPONTE: Okay. And for Jennifer Miller, Judge, she says –

MR. WILLIAMS: No objection.

MS. DaPONTE: Thank you.

MR. WILLIAMS: Wait. Hold on a second. I'm going to undo my view on Touchard. I disagree with you. On Provensal, I'll agree that he couldn't, but I think Touchard said she'd do the best that she could.

MS. DaPONTE: That's exactly right, but she did not say that she could –

MR. WILLIAMS: I object to your challenge.

THE LAW CLERK: Okay. She said she would hope that her tragedy, in case you can't remember, Judge.

THE COURT: No. She said she would try to do the best she could.

THE LAW CLERK: Right. She would just hope it wouldn't spill over, but – She would just hope that it wouldn't spill over. She could try.

THE COURT: [226] [1065] Let's get her up here.

Ms. Touchard.

(Ms. Touchard joins the Judge and counsel at the bench out of the hearing of the prospective jurors.)

THE COURT: I guess we're dealing with the issue of the mitigators and the aggravators. Would you be able to consider, either way, either way and then decide to accept or reject either?

MS. TOUCHARD: In the death penalty?

THE COURT: In the death penalty phase.

MS. TOUCHARD: Could I try to look at mitigators and –

THE COURT: Would you be able to listen to the evidence, be fair, consider it, whether it be a mitigator or whether it be an aggravator, and then decide whether to accept or reject?

MS. TOUCHARD: Yes.

MS. DaPONTE: Judge – I'm sorry. Did you have more?

THE COURT: I'm sorry?

MS. DaPONTE: Did you have more questions for Ms. Touchard?

THE COURT: [227] [1066] I'm sorry. No. You wanted to ask her something?

MS. DaPONTE: I did. I did.

Ms. Touchard, we're just trying to get a clear reading on whether you think – no, not whether you think – whether you could be a fair juror given your circumstances?

MS. TOUCHARD: I – I really just – I don't know.

MS. DaPONTE: I understand.

MS. TOUCHARD: I would definitely try to be as fair – a fair juror, if I were chosen, but I don't know if somehow something would come out that would – I'd – I really don't know.

MS. DaPONTE: Thank you.

Anybody else?

Okay. Thanks, Ms. Touchard.

(Ms. Touchard rejoins prospective jurors remaining outside the hearing of prospective jurors.)

THE COURT: I'm going to excuse her for cause.

MR. WILLIAMS: Are you crazy?

THE COURT: No, I'm not.

MS. DaPONTE: Judge, on Jennifer Miller –

[228] [1067] MR. WILLIAMS: What – What happened on this?

resulted in an all-white jury for an African American defendant. The prosecutor's action in allowing an African American to sit on the panel during the first day of voir dire questioning, and then backstriking him later, supports an inference that the prosecutor was attempting to destroy an argument of a pattern of racial strikes for future challenges of African Americans.

The record shows that this impermissible strategy worked. No *Batson* challenge was made to the peremptory striking of Greg Scott and Thomas Hawkins, Jr. To the extent that defense counsel felt no "pattern" had emerged because Brooks was initially accepted as a juror, and that they could not raise a *Batson* challenge, they were constitutionally ineffective counsel[2]. The mere presence of African Americans on a jury does not defeat a *Batson* claim or an inference of discrimination when otherwise acceptable jurors are peremptorily challenged. *Collier,* 553 So.2d at 819.

Although the trial court did not expressly rule on whether the defendant made out a prima facie case of purposeful discrimination in any of the instances cited above, the trial judge's demand that the prosecutor justify his use of peremptory strikes (or his reception of the state's justifications) is tantamount to a finding that the defense made out a prima facie case of discrimination. *Green,* 655 So.2d at 288.

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[2] Counsel was ineffective under the Sixth Amendment in erroneously believing that the presence of one African American juror defeated a *Batson* claim. Defendant was prejudiced by this error in that the prosecutor exercised peremptory challenges to remove members of the defendant's race from the jury venire for a discriminatory purpose, in violation of equal protection principles.

Once a defendant has made out a prima facie case, the burden of production shifts to the prosecutor, who must offer race-neutral explanations for his exercise of peremptory strikes. Such an explanation need not rise to the level justifying a cause challenge, but must be more than an affirmation of the prosecutor's good faith or a denial of a discriminatory motive. *Green,* p. 25, 655 So.2d at 288; *Collier,* 553 So.2d at 820.

The prosecutor's stated reasons for the back strike of Jeffrey Brooks was that he was "nervous" and concerned about missing class. Defense counsel discounted the characterization of nervousness and explained that the problem regarding missed classes had been eliminated. Because no specific *Batson* challenge was made for Greg Scott and Thomas Hawkins, Jr. due to counsel's ineffectiveness, the state posited no justifications for their removal. The record indicates, however, that there were no permissible grounds to exclude these prospective jurors. The inference that they were peremptorily challenged based on a discriminatory motive cannot but arise. The prosecutor's stated reason for striking Elaine Scott was that she was "weak" on the death penalty. Defense counsel pointed out she stated she could consider both imposition of the death penalty and a sentence of life imprisonment. The prosecutor's stated reason for striking Loretta Walker was that she initially indicated she could not impose the death penalty. This reason is belied by the fact that the prosecutor himself acknowledged that he had rehabilitated her. The fact that Loretta Walker stated she could consider the death penalty in a case with facts different from this case does not disqualify her as a juror. The fact remains that she could consider the death penalty for very serious cases.

After the prosecutor has presented his reasons for exercising his peremptory challenges, "the trial court must assess the weight and credibility of the explanation in order to determine whether there was purposeful discrimination in the use of the challenge." *Collier,* 553 So.2d at 820. The inquiry

> is not whether the State has disproved the existence of purposeful discrimination suggested by the defendant's prima facie case; rather, the question is whether the defendant's proof, when weighed against the prosecutor's proffered "race-neutral" reasons, is strong enough to persuade the trier-of-fact that such discriminatory intent is present.

Green, p. 29, 655 So.2d at 290. The trial court's assessment must be more than a "rubber-stamp" approval of any non-racial explanation in order to uphold the objectives of *Batson. Collier,* 553 So.2d at 821. "Presumably, any prosecutor could confect a set of standard racially neutral explanations for dismissing a juror." *Id.*

> If trial courts were required to find satisfactory any reason given by the prosecutor not based on race, only prosecutors who admitted point blank that they excluded veniremen because of their race would be found in violation of the Fourteenth Amendment's guarantee of equal protection.

Id. The trial judge is required to conclude that the prosecutor's proffered reasons are, first, neutral and reasonable and, second, not a pretext. *See Collier,* 553 So.2d at 821, *citing State v. Slappy,* 522 So.2d 18, 22 (Fla. 1988). Although the prosecutor's stated reasons in the instances detailed above were facially neutral, defense counsel

pointed out they were not reasonable. In each instance, any perceived problem had been eliminated or rehabilitated. The trial judge failed to assess the weight and credibility of each explanation and to make the necessary finding that the justification for the peremptory strike was legitimate. The trial judge erred in denying the *Batson* claims raised by defense counsel. The result was that the defendant was tried by a jury empaneled in violation of equal protection; this error necessitates that the defendant receive a new trial.

Prejudicial photographs

The defendant objected to the introduction of several post-mortem photographs of the victim, Howard Wilson, and also objected to a series of photographs depicting the defendant in various martial arts poses. The trial court overruled these objections and allowed the photographs into evidence. The defendant asserts this was error in both instances because the prejudicial effect of the photographs outweighed any probative value they may have possessed.

"Photographs are generally admissible if they illustrate any fact, shed any light upon an issue in the case, or are relevant to describe the person, thing or place depicted." *State v. Mitchell,* 94-2078, p. 9 (La. 5/21/96), 674 So.2d 250, 257, *cert. denied,* 117 S.Ct. 614, 136 L.Ed.2d 538 (1996). Post-mortem photographs are admissible to prove not only corpus delicti or to provide positive identification of the victim, but to corroborate other evidence establishing the cause of death, the manner in which death occurred and the location, placement, and severity of the wounds. *Id.*; *Bourque,* 622 So.2d at 236. A photograph is not rendered inadmissible merely because it

depicts a gruesome image; the admission of a gruesome photograph is not reversible error unless the prejudicial effect of the photo substantially outweighs its probative value. *Mitchell, supra*; *Martin,* p. 14-15, 645 So.2d at 198.

At trial, defense counsel objected to the introduction of the three photographs depicting the facial wound on Howard Wilson's left cheek. Defense counsel argued:

> Judge, that photograph depicts a very large facial wound. You heard it described yesterday in detail by the first officer on the scene, Officer – Deputy Cook. It's a wound from the ear to the mouth, and it was described as a hole in the decedent's face. The deputy testified that you could see into the hole and see the victim's tongue and his teeth. Those photographs show exactly that, and I don't think that the jury needs to see those photographs. Dr. Garcia [the pathologist], very fairly in her report, described this wound as nonfatal and in parenthesis, she let's [sic] us know how dramatic it is. She calls it "dramatic-appearing", and I think that that is a clue as to how prejudicial these photographs could be. It was – She clearly described this wound as nonfatal, and she clearly warned us that it was very dramatic-looking.
>
> There is no purpose. It doesn't establish cause of death. It doesn't show the jury anything other than how very gruesome this crime was. That has nothing to do with the very intellectual decision they have to make as to what kind of a murder it was. And this doesn't even show that it was a murder. This man would have fully recovered from this injury to his face, and I don't think that the jury needs to see what has already been testified to on the witness stand. Vol. 2, p. 14-15.

The trial court overruled the objection and allowed the photographs to be introduced. Vol. 2, p. 16.

The prejudice of these photographs was overwhelming and was certainly greater than any probative effect they may have had. As noted by the pathologist, these were nonfatal wounds. The defense did not seek to rob the state of the moral force of its exhibits, and indeed did not object to the many photographs depicting the victim's fatal wounds. The defense only sought to keep from the jury photographs which can only be described as grisly and shocking. Although nonfatal, the facial wound inflicted laid bare the victim's cheek to the jawline. Muscle and bone are clearly visible in the pictures. They are certainly "dramatic-appearing" as noted by the pathologist; even the prosecutor described them as "very graphic". In fact, during closing argument in the penalty phase of trial, the prosecutor admitted "[t]hese photos of Howard Wilson are amongst the worst that could be shown to anybody, anywhere, any jurisdiction." Vol. 3, p. 227. It is clear that the only reason these photographs were introduced was to inflame the passions of the jury and to prejudice them against the defendant. The trial court erred in allowing these photographs to be admitted in evidence; their introduction was reversible error which necessitates a new trial for the defendant.

The other set of photographs which were objected to depicted the defendant with martial arts props or in some kind of martial arts costume. Defense counsel argued they had nothing to do with the crime at issue, were so remote in time as to be irrelevant, and were being presented solely to show the defendant was a "bad guy." Vol. 2, p. 6-7. The prosecutor argued that the photographs were relevant to show that he had been trained and to disprove the

defendants assertion in his statement to the police that he had acted in self-defense with the victim while they struggled over possession of the knife. Vol. 2, p. 7. The trial judge allowed the photos in evidence on the basis that the defendant had asserted some sort of self-defense justification in his statement. Vol. 2, p. 8.

The trial court erred in admitting these photographs. First, they were completely remote in time. They were taken while the defendant was in the military, a time before he even knew Mary Snyder. Vol. 2, p. 54, 56-57. Second, they are irrelevant to counter an assertion of self-defense unless you believe the absurd proposition that everyone who has ever served in the military or engaged in martial arts activities is the aggressor in any altercation. These photographs were introduced solely to prejudice the defendant and served no relevant purpose whatsoever under the circumstances of this case. The trial court erred in allowing their introduction in evidence; this ruling constitutes reversible error which necessitates a new trial for the defendant.

Reference to Notorious Case

"Arguments by counsel may not appeal to prejudice, but must be limited to the evidence admitted, the lack of evidence, conclusions of fact drawn from the evidence by the state or defense, and the applicable law." *State v. Martin,* 550 So.2d 568, 572 (La. 1989). During closing arguments of the penalty phase, the prosecutor compared this case with the criminal trial of O.J. Simpson. The following exchange took place:

DA: Mr. Vasquez [defense counsel] tried to describe this man as being the man who – And it was 12 hours later when he called

the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of –

DEFENSE: Your Honor, I object. I want to approach on this.

COURT: Okay. Counsel, come forward.

(Whereupon, the following is taken at the bench, out of the hearing of the jury.)

DEFENSE: He's going to mention the O.J. Simpson trial.

DA: That case –

DEFENSE: I object to that.

DA: Your Honor, based upon what he did in this case, where he sat for about 12 hours, he huddled and pretended to kill himself, just like O.J. did and just like O.J. got away [sic] it. I think that's fair –

DEFENSE: That's ridiculous.

DA: It's a fair comment and those people will decide what weight they want to give to it.

DEFENSE: Judge, that's –

DA: That is as ridiculous as some of the things you said, and I think that's fair comment on something that's common knowledge. And certainly, those people are intelligent enough to give it whatever weight they want to.

COURT: I'm going to allow it.

DEFENSE: Note our objection.

DEFENSE: Please note our objection.

(Whereupon, the following is taken in the hearing of the jury.)

DA: The most famous murder case, and all of you all have heard about it, happened in California very, very, very similar to this case. The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that's not what that man was thinking about when he called in and claimed that he was going to kill himself?

Vol. 3, p. 223-225.

An improper remark during closing arguments will not constitute reversible error unless the court is convinced that the remark influenced the jury and contributed to their determination of the case. A review of the improper remark must give credit to the good sense and fair mindedness of jurors who have seen the evidence, heard the arguments, and been instructed by the court of the difference between argument and evidence. *Mitchell,* p. 11; 674 So.2d at 258.

The defendant is African-American. The jury was all white. It has been proved by countless polls that the majority of white Americans believe that O.J. Simpson was guilty of murdering his wife and, by virtue of the not guilty verdict returned in his criminal case, that he "got away with murder." The prosecutor carefully constructed an all-white jury, as shown by the argument under the

Batson claim. The prosecutor's argument implied that by returning a recommendation that the defendant receive a sentence of life imprisonment instead of the death penalty, the jury would be allowing the defendant to "get away with it" just like O.J. Simpson did. There was no other purpose for the introduction of this reference to the Simpson murder trial than to prejudice the jury against the defendant. Considering the circumstances of this case, it is entirely probable that the prosecutor's improper remark influenced the jury and contributed to its sentencing recommendation. The defendant is entitled to a new trial for this reversible error.

Verdict Contrary to Law and Evidence

Although the state technically proved the elements of a first degree murder, the record shows that the proper jury verdict was manslaughter. Manslaughter is a homicide which would be either first or second degree murder, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. La. R.S. 14:31(A)(1). "Sudden passion" and "heat of blood" are "mitigating factors in the nature of a defense which exhibit a degree of culpability less than that present when the homicide is committed without them." *State v. Lombard,* 486 So.2d 106, 110 (La. 1986).

In this case, the lack of preparation time and the inability to effectively communicate with the defendant robbed the defendant of a coherent defense. Some evidence was introduced which showed the defendant committed the crime in a sudden passion or in hot blood. The jury was aware of the marital difficulties which the defendant

and Mary Snyder were experiencing immediately prior to the murder. The jury was aware that Mary Snyder had pursued an extramarital affair and that the defendant knew about it. The jury was aware that the defendant had, beginning with the time that he was aware of Mary's extramarital affairs, engaged in instances of domestic abuse. Because defense counsel failed to introduce mental health evidence in the guilt phase of trial, the jury was unaware that the defendant was suffering from a major depression brought on by his marital difficulties. The jury was aware that the defendant wanted a reconciliation with Mary after she moved out of their home and that Mary had held out the possibility of a reconciliation with the defendant. The jury was aware that, notwithstanding this plan to reconcile, Mary had made a very late night date with a married man whom she had just met. The jury was aware that Mary had gone on this date and was making plans to see this man again, notwithstanding her plans for reconciliation with her husband. The jury was aware that the defendant had paged Mary continuously that night in an attempt to contact her.

What the jury was unaware of, and what the defense could not present or investigate fully, was that the defendant came upon Mary and Howard Wilson while they were engaged in a sexual act in Wilson's car. Had this information been fully investigated and presented to the jury, the mitigatory factors of provocation sufficient to deprive an average person of his self control and cool reflection would have been proved by a preponderance of the evidence and the jury would have found that the defendant acted in a sudden passion and in hot blood. As it was, the jury was only told that investigating police officers did not specifically check the victims' clothing for undone zippers and

that Mary denied that any sexual act was occurring in the car when the defendant approached them. This provocation was only presented to the jury in penalty phase rebuttal as a justification the defendant told the state's mental health experts. The introduction of the evidence at this later point, and without a foundation to support it, appeared like a wild, blame-pointing assertion which the jury could do nothing with but ignore. Only the defendant could have effectively presented this evidence in his own defense and, unfortunately, he was not enough stabilized on his medication to take the witness stand.

The fact that the defense was prevented from presenting evidence of the immediate provocation which caused the defendant to act in sudden passion is similar to another Jefferson Parish case, *State v. Weiland,* 505 So.2d 702 (La. 1987). In *Weiland,* the defendant met and fell in love with Ida Baudoin. Baudoin had borne three illegitimate children by Paul Sahuque; the children had been in state foster care for fourteen months. Weiland and Baudoin lived together immediately. Baudoin was still having sex with Sahuque, unbeknownst to Weiland. Upon learning of Baudoin's possible infidelity with another man, Weiland beat her. Baudoin stayed with relatives; Weiland, an alcoholic in remission, went on a lengthy drunk and wrote her attempting reconciliation. The next day, still drinking, Weiland decided to move out of their apartment. Weiland was told by others that Baudoin and Sahuque were going to move into that apartment. While Weiland washed his clothes and prepared to move, he had a conversation with Baudoin. Baudoin asked for a reconciliation and Weiland told her no. Baudoin got violent and angry and told Weiland something. The trial court excluded Baudoin's words to Weiland as hearsay. The jury in that

case only heard that Weiland reacted by stabbing both Baudoin and Sahuque. Baudoin was killed; Sahuque was seriously injured. Weiland was convicted of first degree murder and sentenced to death.

Defense counsel had proffered the words Baudoin spoke to Weiland just before he murdered her and injured her lover. She told Weiland, "that's all right. I never loved you anyway. I was just using you to get my children back." *Weiland,* 505 So.2d at 705. The Louisiana Supreme Court reversed the conviction and sentence and remanded for a new trial, finding that testimony as to Baudoin's statement shortly before the homicide was critical to this defendant's manslaughter defense. "By restricting evidence bearing on that defense, the trial court clearly erred and the erroneous ruling deprived defendant of a fair trial." *Id.,* 505 So.2d at 707.

Similarly in this case, denial of continuances to allow the defendant to stabilize on his medication and to allow defense counsel to investigate this new allegation that the victims of the defendant's assault had been engaged in a sexual act immediately prior to his attack deprived defendant of a fair trial. This testimony would have been critical to the defendant's manslaughter defense; the ends of justice demand that a new trial be granted the defendant so that this evidence might be presented by a mentally stable and coherent defendant.

—

IN CONCLUSION, in light of the above and for all the foregoing reasons, defendant prays that a new trial be granted.

Respectfully submitted,
FARMER & BURNS, LTD.

/s/ Marion B. Farmer
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CERTIFICATE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by depositing same in the United States Mail, postage pre-paid and properly addressed on this 18 day of August, 1997.

/s/ Marion B. Farmer
MARION B. FARMER

[1] [1602] **TWENTY-FOURTH JUDICIAL DISTRICT COURT**

PARISH OF JEFFERSON

STATE OF LOUISIANA

NO: 95-5114 DIVISION "H"

STATE OF LOUISIANA

VERSUS

ALLEN SNYDER

Testimony and proceedings taken in the above numbered and entitled cause in open court on Friday, August 22, 1997, before the Honorable Kernan A. Hand, Judge presiding.

[Hearing and Ruling on Motion for New Trial]

* * *

[4] [1605] PROCEEDINGS

MR. ROWAN: The next case on your docket is the State versus Allen Snyder, Your Honor, it's set for a motion for a new trial.

MR. FARMER: Good afternoon, Judge, Marion Farmer on behalf of Mr. Snyder.

I appreciate the Court passing me while I took care of the other matter in another court across the river.

We're prepared to proceed with the argument on the motion for a new trial, Judge, at this time.

THE COURT: Yeah, let's proceed.

MR. FARMER: Judge, as you know, I didn't handle this case in the trial phase, however, after obtaining

the transcripts and the complete record in this matter, and going over everything in great detail with Mr. Snyder, we've written what we think is a very exhaustive memorandum in connection with this matter. I just want to kind of hit the high spots, and I'm sure Mr. Rowan and you have had a chance to look at it already.

MR. ROWAN: Yes.

MR. FARMER: And I'll kind of approach them in generally the order in which I addressed [5] [1606] them in the memorandum.

Judge, one of our first arguments of error in this matter, is the fact that this being a first degree murder case, the lady that was appointed to represent him, and the gentleman that handled the penalty phase, we contend did not have sufficient time to prepare the case for trial. If this had been a simple drug case, if this had been a burglary, if this had been an aggravated battery it would have been different.

But in this situation, a case that involved very complex issues, both factual and legal, we feel like that Mr. Snyder's rights were prejudiced by the fact that he was not – his attorneys were not given sufficient time to prepare.

As best I can tell from the record, Judge, the public defender's office was appointed to represent Mr. Snyder on May the 3rd, 1996, or maybe it's '95 that we're talking about. Is it '95 or '96?

MR. ROWAN: '96.

MR. FARMER: '96, okay.

With a trial date set for August 27th of that same year, just a couple of months off. And on August 16th the lady who was representing him filed a motion to continue the trial on that basis, and several other grounds also. And in a hearing held before [6] [1607] the Court on August the 20th, these motions were denied.

I think both the lady, Graham dePonte, and Mr. Vazquez who assisted her and handled the penalty phase, both indicated that they felt like this was not sufficient time to prepare for a case of this magnitude.

I think the Court heard the matter, and held that in fact there was time.

I realize that the jurisprudence holds that Court has wide discretion in matters of this nature, but we feel like that prejudice was shown here for a number of reasons; one, was just the fact of the number of days available.

Additionally, Mr. Vazquez, I think, pointed out on the record, that he had another murder trial in between the appointment, and the time of this trial. And it's just about, I think it's common knowledge that to prepare for a case of this type, takes a terrific amount of time, and I think it's clear that he did not have time; neither did Ms. dePonte.

Judge, at the time that he was incarcerated he was on an antidepressant called Sinequan, and at some point it was determined that this maybe was not the best medication for him, it was causing terrific problems for him, and I think Doctor Richoux recommended, and maybe other doctors too, that he be switched to either Prozac or [7] [1608] Zoloft, which are similar type medications in some ways, but have a different effect on individuals.

As a matter of fact, that was done, he was switched to Prozac on August the 16th, 1996, which was, as I calculate it, eleven days prior to the trial.

The doctor testified that it would take about six weeks for the defendant to receive the full benefit of that medication, to get completely straight, or as straight as he would be as a result of the benefits of that medication, and he was not given that. Obviously he only had less than two weeks.

At the trial itself, the lady who was representing Mr. Snyder, in her opening statement, conceded that he had in fact killed the gentleman, Howard Wilson, and had injured Ms. Snyder. And then, that really only left two questions that – two approaches for the defense to take.

Number one, whether his culpability was affected by his mental state, which is really an insanity defense of course, and then – or was there provocation of such a nature as to make the case a manslaughter case.

It just appears, Judge, to us, that the way that the case developed, with the failure of the two counsel to have sufficient time to think through the case, to meet with Mr. Snyder, to do the things [8] [1609] that were necessary to be done, caused this case to turn from what really and truly, to me, is at best a manslaughter case, into a first degree murder case, and then to, unbelievably, a death penalty case. I think that's what happened here.

Going on with problems that developed because of the lack of time, and because of his mental state, you know, it was just some short time before the trial that he brought up the fact that he saw his wife engaging in a sexual act in the vehicle. I think this was a result of the fact that he

was not in a coherent mental state, and that was one of the problems that he had.

When it came right down to the trial though, I think defense counsel, and I realize it's easy for me to second guess, standing up here some months later, not under the pressure that a counsel is under in a murder trial, and say that they didn't do everything exactly right, it's just kind of easy for me to do that. But, I've been in their position, and I know that it's difficult, they were in a very difficult position, but for whatever reasons, it appears to me that the insanity defense was basically abandoned during the trial, it was just basically given up.

However, they came back then in the penalty phase, and then brought up the insanity situation and the man's mental [9] [1610] condition and all, and of course that looked like, well gee, now they're just trying to grasp for his life, they're trying to salvage his life out of this thing, and so they're doing anything, you know, they're just grabbing for straws.

And of course, the prosecutor, doing his job, you know, he points that out, and he points that out clearly, that this is all they're doing now, they're just trying to save this guy, this guy is a vicious horrible murderer, a killer, and these people are trying to save him, after you've seen all the evidence of his crime.

Switching now, for a second Judge, to the Batson claim, and I've gone through that in some detail in my memorandum, insofar as cases and all that support that, and I'm just going to touch on it briefly.

But this appears to be so obvious and so strong, that it's just amazing to me that the prosecutor handled the

case in this manner. And as you'll recall, what happened was, in the first panel that was called, there was a young man, a young black man, Jeffrey Brooks, who was a student I think at Southern University, he had some reservations about being able to serve because of he had to student teach; and the Court went to the trouble to have your law clerk, or someone else in your office, contact the school and find out what problems that might [10] [1611] cause for him, for the young man. The Dean, or someone in their office stated that as long as he could make up his time teaching, that would be fine, and he could serve. And so he was selected on the jury, he was selected at some point there, and actually – he was not challenged, and was sworn in as a prospective juror, I guess is the term, he was not sworn in with the final jury though.

All right, they're going along, and different African Americans come up, Greg Scott, Thomas Hawkins, Elaine Scott, various ones, Loretta Walker, and each of them ended up not being on the jury, for one reason or another were stricken by the prosecutor.

Finally, at the time that – I think they were at the Bench discussing Ms. Walker, is when the prosecutor then goes back and says, Hey, I want to use a back-strike and take care of this man, Mr. Brooks, you know, the only black person who was on the panel at the time, he goes back and cuts him. And we have a situation where we have a black African American defendant, in a situation where you have a Parish that has a modest black population, and we realize perfectly Judge, that we're not entitled to one black person on the jury, five, to half, or whatever, you know, that's not the law. But it is not fair in a situation where the prosecutor cut those [11] [1612] people for no good reason, and admittedly the defense

counsel, with some of the people, didn't ask for – didn't ask for race neutral reasons, and that may have been, you know, a problem there insofar as what was done. But nevertheless, to go back and strike the one person on there, who would have been the only African American juror, for no good reason, giving the basis, Well, he seemed kind of nervous, and we think he might be concerned about school. And the Court, through its employee, had already obtained information, apparently, that it would not present a problem for him, and that he had been sworn in.

Under those circumstances we feel like that it was just – it was just atrocious for the prosecutor to do that.

Now, what I think happened here was, Judge, and candidly, and I wasn't at the trial; I think that the prosecutor, and I have to point out it was not Mr. Rowan, it was someone who is no longer with this office, it was a different District Attorney's Office at the time, and I don't cast any aspersions at Mr. Rowan whatsoever, or his office, the office today, they're just doing what they have to do taking over a case that's already happened some time ago.

But the prosecutor, I think, had no belief, he had no earthly idea that he would [12] [1613] get a death penalty in this case. I think if he had thought that, he certainly would not have struck Mr. Brooks. But he had no idea this case was going to come under a microscope like a death penalty comes under when you have a person who's been ordered – been found guilty of first degree murder, and ordered to be put to death. I think if he had thought for a second that that was going to happen, he would not have done it, I think. He made a tactical move there, and I think it was a terrible error, and it's going to cause this

case, – either Your Honor to rule in favor of a new trial, or cause the case to come back at some point for a new trial.

As I said, the record clearly indicates the jury ended up being an all white jury, with a black African American defendant.

Another thing, Judge, that the prosecutor did, and I think was clearly in error, and I realize now that you're having to rule on this motion for a new trial, on some things that you've already ruled on during the trial, and in order to rule in our favor, you would have to – you would have to, in fact, find that Your Honor, yourself, had made some error and not done everything entirely proper during the trial. But I've been a prosecutor myself, I've been a defense attorney, and in the heat of a trial a lot of things happen, you know, the [13] [1614] jury is here, things are moving, you're trying to move the case, you're trying to move it along. One thing to me that's very very clear, that's the photographs that were introduced in this case.

Insofar as the photograph of the man's jaw being cut, it was, you know, the worst ever. I think one of the medical witnesses said it was a very very graphic photograph. The prosecutor said that himself. In fact, after arguing to the Court at the Bench, well, that it was all part of the evidence and he had to get it in, and so forth. And that wasn't the cause of death, that photograph.

He then comes back in his penalty phase and says something like, I have it quoted here in my brief, I don't see it right now, but these are the most horrendous photographs you'll ever see anywhere. You know, these are the most horrible photographs you'll ever see, and he's right, you know, you know, he told the truth then, he was absolutely right, you know, they are horrible photographs,

they're outrageous photographs, and they didn't do anything in this case, they didn't help this case insofar as guilt goes, all they did was make the jury think, God, this is horrible, oh, this is so bloody, this is horrible, this is a horrible thing.

And that's the reason that he ended up [14] [1615] getting a death penalty in this case, because he got these horrible doggone photographs in, that's one of the main reasons.

Another thing that he put in, which was totally irrelevant to the case, were the so called martial art photographs.

Now Judge, if the man was alleged to have killed Mr. Wilson by some sort of a karate chop, or some sort of a karate kick, or some sort of a Jujitsu hold or maneuver, totally relevant, you know, completely relevant, important, necessary to the trial of the case. But that was not the way that the man died, the man died from stab wounds, Judge, it had nothing to do with martial arts, nothing whatsoever.

And the idea that the prosecutor had in his mind, and what he thought was, I can show this guy, you know, in a pose, and he looks like a vicious person. Ordinarily he looks like a clean-cut young man, you know. But here he looked like he was just in a vicious pose, and that he's bound to hurt somebody, you know, he was out to hurt somebody. And plus, these things weren't relevant timewise, they were no where close to the time that this crime occurred, they were back before Allen Snyder ever knew Mary Snyder, they were years ago, they had no relevance whatsoever. But they showed this jury this, an all white jury, that this is a vicious black man who is a vicious person, [15] [1616] and he's a killer, and he's killed with a

knife, and he could kill you with his hands, that's what the purpose was, and it succeeded.

For the prejudicial effect of these photographs, both the martial arts photographs, and the medical photographs, far outweighed any possible probative value, any possible probative value.

Okay. Here's something, Judge, there are several things in this case, and I have to be candid with the Court; in almost thirty years of doing criminal law as a public defender, as a district attorney, as a defense attorney, this first degree murder case has more potential grounds for reversal than any I've ever been involved in, had any action in, at any time that I've ever, you know, observed, whether one of my assistants prosecuted it, or that I prosecuted, or that I've defended, I've just never seen anything – we completely overlooked some issue that in many cases would have been fairly substantial, because we had so many strong ones.

Here's one, the O. J. Simpson case, you know. The prosecutor ends up bringing up the O. J. Simpson case, and defense counsel obviously got up, this has no relevance. They approached the Bench, they had a discussion, and the D.A. says, finally, in his argument, in his argument, "The most [16] [1617] famous murder case, and all of you have heard about it, happened in California, very very very similar to this case. The perpetrator in that case claimed he was going to kill himself as he drove in a Ford Bronco, and kept the police off of him. And you know what? He got away with it.

Ladies and gentlemen, is it outside the rim of possibility that that's not what that man was thinking about when

he called in and claimed he was going to kill himself", pointing to Allen Snyder of course.

That's in volume three of the record, page 223.

Judge, that's just outrageous, and I just, I feel like that that's so bad. Everybody knows, and I mentioned in my brief about the fact that I'm, you know, – you'd have to be in a cave for the last couple of years to not know, and the prosecutor knew exactly what he was doing, to not know that most white people, this was an all white jury, believed that O. J. Simpson was guilty as hell, and that he was getting away with murder, you know. And it's outrageous for the prosecutor to analogize to that case, to this case, which has nothing to do with it, nothing similar, it does not involve a cross racial romance, or anything like that. And to use that to try to hammer this man down, and to get a jury to say, That's right, you know, O. J. Simpson got off, this guy is [17] [1618] trying to get off, he's like O. J. Simpson, you know, but we weren't on that jury in California, but we're on a jury here, we can do something about it. And that's totally outrageous.

The prosecutor had maneuvered the jury around to where it was all white, you know. If there had been a couple of black people on there, when they got back in the back to talk about the case, it's kind of hard to say some of those things, you know, that – and we don't know what was said back there, but it's kind of hard to say things about a black defendant when there's one or two blacks on the jury, you know, it's hard to use some of the terms and things that we know are used in situations like that.

Judge, this verdict was contrary to the evidence too. If this was ever – if there was ever a manslaughter case, this is a manslaughter case at the very best. I mean, I don't

have to go through all the facts with you, but this was clearly a manslaughter case. It was not a murder case, and I'm darn sure it was not a death penalty case.

Now the Court has within its power, as you know, there are a number of things you can do; you can order a new trial, you can, according to the Code of Criminal Procedure, you can throw out the verdict and enter a verdict of guilty of manslaughter, you have [18] [1619] a number of things within your power to do, if you choose to do so.

And we just feel like that clearly this is a situation where something should be done, because this case cries out, begs for something to be done.

It's just outrageous the way this matter has turned out, and there were numerous instances on the part of the prosecutor, a very experienced prosecutor who knew what he was doing, it wasn't just some kind of little error, oh, I slipped up here, he knew what he was doing, he was out to hammer this man, and I think he had no earthly idea, you know, he probably feels good about his ability, and he's an exceptional prosecutor, but I'm sure he had no earthly idea that he was going to end up with a death penalty in this case, although he used a number of tactics which did in fact bring that about, and brought about a gross miscarriage of justice.

Thank you, Judge.

MR. ROWAN: Just a brief response.

I didn't try the case, Judge, you were the Judge on this particular case, you heard all of the motions, especially when Ms. dePonte and Mr. Vazquez were appointed; I don't know if it was in May or in April, but I know that

they came in, there were discussions from the point that they were [19] [1620] appointed, in which this case was set at a time that they knew it was going to go to trial.

I know that things happen, I know that discovery and everything was met. I know that there were numerous hearings that were held. There was original trial dates that were reset for two or three weeks. I know that the doctors and different – there was at least four or five people that evaluated this gentlemen, they all found him competent to stand trial.

I've seen that Doctor Richoux has been mentioned, and where he said that he may not be able to assist his counsel, and things like that, but nowhere does it specifically say he can't assist his counsel. And that was the whole argument in some of the continuance motions that I saw, that he couldn't communicate with them.

Doctor DePrato, and I forget the other doctor's name, because I'm not looking at the record, they examined him in August, when they did the competency hearing, and they did a very very detailed report, it's about six pages in which they said that he can answer questions, he does know what he's supposed to do in court, he was able to communicate all possible misstatements of what happened in court, and wouldn't do outbursts, that he would tell, specifically, his attorney what was going on, how things [20] [1621] could be changed if somebody were lying on the witness stand. They were very specific in what he was able to do.

And I believe that you were justified in not granting a continuance. I don't think it was an exorbitant amount of time; four months in [sic] plenty enough time to prepare for

a murder trial, especially one that you've been told is going to go.

As for Batson, I wasn't here, I don't know what exactly was challenged. I know that under Batson there must be a prima facie showing of a pattern. Evidently the objection was raised, and you listened to the neutral reasons. I don't know why Mr. Williams cut Mr. Brooks, who was used, I don't know.

Basically, if he was worried about this gentlemen thinking about whether he would have the time to make up the criteria so that he'd be able to pass his student teaching course, I don't know. But I do know that he gave a legitimate reason that you considered, and if you had thought that it was not within the parameters of Batson, I believe that you would have had him keep that particular juror.

You also looked at the photographs. Photographs that are considered, whether they're autopsy or not, the State has a right to show every particular part of this particular crime. Wounds are elements that [21] [1622] show specific intent to kill, and I believe the photograph that was shown of the slice mark, the jury had a right to view that particular wound, because it went to the viciousness of this attack, his premeditation, and his specific intent to kill, which is why you allowed that photograph to come in as part of the State's case in chief.

And I believe there's a number of cases, I'm thinking of State v. Copeland, and a few other cases that say you have the right to present, to show how many stab wounds a person has received, to go towards their intent. And this was a specific intent crime.

As for grounds for reversal, I think the testimony showed from independent witnesses that weren't related to the victim, either one of the victims, that said that – and even his own statement, that – I believe in his statement that he said that he drove to this particular location, he got out of his car, which was across the street from where this other person, where his wife lived, he waited in the bushes, he went there armed with a knife. He waited, and when they came to that particular area, he came out of the bushes, charged in that car and started stabbing him.

Now the fact that he said in his statement that he went there because he just [22] [1623] wanted to talk to them, I believe lead to a point where he carried the knife, he didn't go there to talk to them, he did that – because if he had gone to talk to them, he would have walked right to them, he wouldn't have waited behind the bushes for them to come to this particular area. He went there, he stabbed them, and he fled the scene.

As for the O. J. Simpson argument, in his particular statement, he said that he barricaded himself, he called the police, he got in there, he was going to kill himself, it was the same type analogy, you know. Mr. Simpson did that in his Bronco, said that he was going to kill himself to keep people at bay. I wasn't there, I don't know, I didn't hear Mr. Vazquez's argument, I'm only going to try to answer, to try to show what he might have tried to use.

I do know one thing about Mr. Williams, he enters into a trial, and if it was a specific first degree murder, he did have an idea that it would come back first degree, otherwise he wouldn't try it.

I think the Judge was in court long enough to know that if he set a case for trial, he believed that it would come back guilty as charged, and he tried this as such.

And I had numerous discussions with Ms. dePonte [sic], where he informed her that he [23] [1624] believed it would come back as such.

I believe that the Court has had a long enough time to consider all the factors in this case, and I believe that based on the particular motion grounds, that the Judge, being that he heard all the pre-trial motions, and was able to participate as the Judge in this particular trial, I would ask that the Judge deny the motion for a new trial.

THE COURT: All right. The motion for a new trial alleges a number of things.

One is that the verdict was contrary to the law. And the defendant argues that he didn't have time to develop his defense to show insanity or sudden passion or hot blood. But the Court believes that the jury was presented with extensive information regarding the defendant's state of mind and feelings, both at the time of the crime, and just prior to the offense.

The jury was also instructed on the law as it applies to the manslaughter statute.

The defendant was also incarcerated for over one year prior to trial, to develop additional information regarding his frame of mind at the time of the offense.

Any opportunities to develop these defenses were not hindered by the final continuance being denied.

As to the Batson challenges, the Court [24] [1625] believes that the D.A. explained sufficient race neutral reasons for his challenges.

A full month and a half passed between the date of the sanity commission appointment and the date of trial.

Doctor DePrato addressed the issues of the defendant's depression in her report, and her testimony. And her final finding was that the anti-depression medication hadn't been taken for a full six weeks, – or the fact that it hadn't been taken for the full six weeks did not impede the defendant's ability to assist in his defense, and understand the proceedings against him.

So accordingly, the motion for a new trial is hereby denied.

MR. FARMER: Judge, we'd like to respectfully object to the Court's ruling on the motion for a new trial, and we'd like to make an oral motion to appeal to the Louisiana Supreme Court, and we'd like to file that, I'll mail it Monday. I meant to bring it with me today, but came off without it.

* * *

SUPREME COURT OF THE STATE OF LOUISIANA

No.98-KA 1078

STATE OF LOUISIANA

VERSUS

ALLEN SNYDER

(CAPITAL CASE)

FILED: _____ DEPUTY CLERK: _____

MOTION FOR REHEARING

NOW INTO COURT, through undersigned counsel comes defendant ALLEN SNYDER, who suggests to this Honorable Court that this court's decision of April 14, 1999 affirming the conviction and death sentence of defendant where the state was allowed to strike all minority members of the jury venire so that defendant (who was black) was tried ... front of an all white jury to which the state then directed racial remarks during argument results in a miscarriage of justice. Not only was the prosecutor's blatant comparisons between the defendant's trial and the O.J. Simpson trial an egregious attempt to prejudice the all white jury with irrelevant material, it was also a violation of his earlier oath to the court that he would not do so and the Court's ruling making the promise effectively an order of the court.

To allow such blatant misconduct by the prosecution in a case where the ultimate result is *death* for the defendant is the most basic miscarriage of justice.

Defendant therefore prays this Honorable Court to grant a rehearing in the above captioned matter and ultimately overturn the defendant's conviction and death sentence.

Respectfully submitted,

/s/ Marian B. Farmer

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750 So.2d 832

SUPREME COURT OF LOUISIANA

No. 98-KA-1078

STATE OF LOUISIANA

v.

ALLEN SNYDER

(Filed April 14, 1999)

Marion B. Farmer, Covington, Counsel for Applicant.

Richard P. Ieyoub, Attorney General, Paul D. Connick, Jr., District Attorney, James Alan Williams, Alfred Adolphe Olinde, Jr., Counsel for Respondent.

KIMBALL, Justice.*

On August 29, 1996, a jury convicted defendant, Allen Snyder, of the first degree murder of Howard Wilson. One day later, after the penalty phase hearing, the jury unanimously determined that defendant should receive the death penalty. Defendant was subsequently sentenced to death by the trial judge in accordance with the jury's determination. Pursuant to La. Const. Art. 5, §5(D), defendant appeals his conviction and sentence, arguing five assignments of error.[1] Because we find error in the trial court's failure to investigate defendant's request for a continuance based upon a claim of incompetence caused by his alleged inability to assist his counsel due to a change in his medication that left him mentally unstable at the time of trial, we remand this case to the trial court for a

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* CALOGERO, C.J., not on panel. *See* Rule IV, Part 2, Section 3.

[1] Because each of defendant's five assignments of error was briefed and argued, this opinion contains no unpublished appendix.

hearing to determine whether a retrospective determination of defendant's competence is still possible. If such a determination is, in fact, possible, the trial court shall hold a hearing to determine whether defendant was competent at the time of trial. If the trial court finds that defendant was competent, no new trial is required as we find none of defendant's other assignments of error have merit and therefore conditionally affirm his conviction and sentence. If the trial court finds that a retrospective determination of defendant's competence cannot be had, or, if after hearing evidence, determines that defendant was not competent at the time of trial, defendant shall be entitled to a new trial.

FACTS

Defendant, Allen Snyder, and his wife, Mary Snyder, were having marital difficulties in the summer of 1995. Towards the end of their relationship, neither partner remained entirely faithful to the other. After several incidents of physical abuse at the hands of her husband, Mary Snyder took their children and went to live with her mother. Despite this separation, defendant contacted Mary one evening in mid-August and the two discussed the possibility of getting back together. Mary agreed to meet defendant the following day to discuss a reconciliation. Defendant was anxious to meet with Mary and wanted to see her that evening, but she put him off, telling him she "didn't want to see him" that night. Rec. vol. 6, p. 1267.

Instead, Mary went out on a late night date with Howard Wilson, a married man she claimed she had recently met. Defendant repeatedly tried to page her during the evening, but Mary refused to respond. At the end of their date, at approximately 1:30 a.m. on August 16,

1995, Howard Wilson pulled his vehicle up to the home of Mary's mother to drop Mary off. Defendant walked up to the car, opened the driver's side door of the vehicle, and attacked both Howard Wilson and Mary Snyder with some sort of knife containing a double-edged blade. He inflicted nine wounds upon Howard Wilson and nineteen wounds upon Mary Snyder.

Gwen Williams witnessed the assault. She testified that she observed defendant stooped down beside a trailer that was across the street from the home of Mary's mother. She then saw defendant run from the trailer to Wilson's car, open the car door, jump into the car and attack Howard Wilson and Mary Snyder. Williams screamed at defendant which caused him to run away. Williams then helped Mary to her mother's house and the police were called. Howard Wilson died at East Jefferson Hospital. Mary Snyder survived the attack and testified at trial.

Approximately twelve hours later, defendant called the police claiming he was suicidal. The police went to his house to investigate, initially unaware of the fact that he was a murder suspect, and found defendant barricaded in his house and curled into a fetal position on the floor. Police officers then took defendant to the Criminal Investigations Bureau and, after advising him of his rights, took a statement from defendant. In his statement, defendant claimed he went to Mary's mother's house "to see where she was and who she was with." Transcribed Audio Tape Statement, p. 3. He stated he brought a knife to "scare her, make 'em talk to me." *Id.* He told police that he approached the car not knowing whether Mary was inside the car or not. He opened the car door with the knife in hand and, according to his statement, told Howard Wilson they needed to talk. A scuffle then ensued. Defendant told

police he was "out of control" at that time. *Id.* at 5. After the attack, defendant ran off, throwing the knife down somewhere along the way.

The state subsequently charged Allen Snyder with one count of first degree murder. After the trial, which began on August 27, 1996, a jury found defendant guilty as charged. After finding the presence of one aggravating circumstance,[2] the same jury unanimously determined defendant should receive the death penalty. A sentence of death was subsequently imposed by the trial court.

LAW AND DISCUSSION

Assignment of Error No. 1

In his first assignment of error, defendant argues that the evidence presented at trial did not support a conviction for first degree murder, but rather one for manslaughter. This claim is based upon the contention that defendant came upon the victim and Mary Snyder when they were engaged in a sexual act in the victim's car which was parked outside the home of Mary's mother.[3] Defendant maintains that when he saw his wife involved in sexual

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[2] Specifically, the jury found that:

> The offender knowingly created a risk of death or great bodily harm to more than one person.

Rec. vol. 1, p. 196.

[3] No evidence of sexual activity between Mary Snyder and Howard Wilson was presented in the guilt phase of defendant's trial. In the penalty phase, however, two state experts testified that defendant told them that when he opened the car door, he saw his wife performing a sexual act with the victim. Rec. vol. 7, pp. 1534, 1546.

relations with another man, he was provoked to the point of losing his self-control and cool reflection.[4]

Manslaughter is a homicide which would be either first or second degree murder, but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. La. R.S. 14:31(A)(1).[5] It is the presence of "sudden passion" and "heat of blood" that distinguishes manslaughter from murder. This court has repeatedly stated, however, that "sudden passion" and "heat of blood" are not elements of the offense of manslaughter. Rather, they are mitigatory factors in the nature of a defense which exhibit a degree of culpability

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[4] The defense claims that defendant came upon Mary Snyder and Howard Wilson while they were engaged in a sexual act in Wilson's car. Appellate counsel argues that had this information been fully investigated and presented to the jury, the mitigatory factors of provocation sufficient to deprive an average person of his self-control and cool reflection would have been proved by a preponderance of the evidence. However, no such evidence was presented by the defense in the guilt phase of defendant's trial. Counsel also argues in this assignment of error that the trial court erred in denying defendant a continuance which would have allowed defense counsel time to investigate this aspect of a manslaughter defense and would have allowed defendant time to stabilize on new anti-depressant medication. This argument is treated in our discussion of defendant's assignments of errors dealing with the trial court's failure to grant a continuance.

[5] La. R.S. 14:31(A)(1) defines manslaughter as:

> A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed;

less than that present when the homicide is committed in the absence of these factors. *State v. Lombard,* 486 So.2d 106 (La.1986); *State v. Tompkins,* 403 So.2d 644 (La.1981). Because they are mitigatory factors, a defendant who establishes by a preponderance of the evidence that he acted in "sudden passion" or "heat of blood" is entitled to a verdict of manslaughter. *Lombard,* 486 So.2d at 111.

Defendant argues that "some evidence" was introduced that established that defendant committed the crime in sudden passion or heat of blood. In reviewing this contention, we must determine whether a rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found that the mitigatory factors were not established by a preponderance of the evidence. *Lombard,* 486 So.2d at 111. *See also Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781 (1979). The defense argues the jury was aware of the marital difficulties between defendant and Mary Snyder, of Mary's extramarital affair and instances of domestic abuse as a result of those affairs. Furthermore, the jury heard evidence that defendant wanted a reconciliation with Mary and that she was open to such a possibility. Finally, the jury was aware that defendant had paged Mary continuously before the murder in an attempt to contact her. The defense maintains that defendant's discovery of his wife on a late date with the victim, after she had made reconciliation plans with defendant, sufficed to deprive him of his self-control and cool reflection.

Although "some evidence" presented at trial supported a conclusion that the victim and defendant's wife were on a date, there was no evidence presented to support a determination that the two were involved in any type of sexual activity when defendant came upon them. Additionally,

defendant's conflicting accounts of the incident make it difficult to determine his true motivation for the act. Defendant told police one version of the events and defense doctors yet another. The conflicting accounts given by defendant after the murder do not constitute affirmative, substantive evidence of his guilt, *State v. Savoy,* 418 So.2d 547 (La.1982), but they undoubtedly undercut the reasonableness of the principal defense theory of manslaughter.

The State theorized that defendant was a remorseless killer who repeatedly stabbed his wife and the victim then fled the scene, disposed of the murder weapon and created a flimsy suicide theory when he decided to turn himself in to the police. The prosecution presented evidence which established beyond a reasonable doubt that the defendant was guilty of first degree murder. Defendant's own confession and the testimony of two witnesses demonstrated that defendant waited and watched the victim and his wife and then approached them, while armed with a knife, on his own accord. According to defendant, he suggested that the three of them "talk." No talking ever occurred, however. Instead, as both Mary Snyder and Gwen Williams testified, defendant brutally stabbed his wife and Howard Wilson and then fled from the scene. Consequently, the verdict reflects the evidence admitted at trial. Jurors may rationally have concluded either that (1) defendant lied about the circumstances of the offense to excuse what the evidence otherwise overwhelmingly demonstrated, a specific intent homicide during a controversial course of action in which he also specifically intended to kill or to inflict great bodily harm on at least one other person (*i.e.,* his estranged wife); or (2) that a reasonable person would not have been provoked to homicidal passion by the sight

of his estranged wife with another man. In either case, the evidence supported the jury's verdict and rejection of the defendant's manslaughter defense.[6]

Assignment of Error No. 2

Batson Claim

In his second assignment of error, defendant argues that the trial court erred in allowing the State to exercise five of its peremptory challenges against black prospective jurors in violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Specifically, defendant contends that prospective jurors Jeffrey Brooks, Greg Scott, Thomas Hawkins, Jr., Elaine Scott, and Loretta

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[6] The substantive definition of first degree murder under La. R.S. 14:30(A)(3) differs critically from the aggravating circumstance in La.C.Cr.P. art. 905.4(A)(4). The latter requires proof that the offender "knowingly created a risk of death or great bodily harm to more than one person" while the former requires proof that the offender had the "specific intent to kill or to inflict great bodily harm upon more than one person." A finding under La. R.S. 14:30(A)(4) will always support the existence of the aggravating circumstances in Article 905.4(A)(4), but the converse is not necessarily true. *See State v. Ortiz,* 96-1609, p. 17 (La.10/21/97), 701 So.2d 922, 933 ("For purposes of the guilt phase of the trial, it was not sufficient for the jury to find that defendant merely created a risk of the death of more than one person. The statute required the jurors to find that defendant actively desired the result that followed from his actions."). In this case, rational jurors could find on the evidence that defendant specifically intended to kill or to inflict great bodily harm upon Howard Wilson and Mary Snyder during a consecutive course of conduct which resulted in the death of at least one person and that defendant had therefore committed first degree murder as defined by La. R.S. 14:30(A)(4). *State v. Bourque,* 622 So.2d 198, 243 (La.1993); *State v. Johnson,* 541 So.2d 818, 826 (La.1989); *State v. Williams,* 480 So.2d 721, 726 (La.1985). *A fortiorari,* that evidence also supported the jury's finding of the aggravating circumstance in Article 905.4(A)(4) at the penalty phase of trial.

Walker were impermissibly excluded by the State. The record of the voir dire proceedings reveals that the prosecutor used peremptory challenges to strike every African American called as a prospective juror who survived challenges for cause. This resulted in an all-white jury for the defendant, who is African-American.

Under *Batson* jurisprudence, a defendant must first establish a prima facie case of discrimination by showing facts and relevant circumstances that raise an inference that the prosecutor used his peremptory challenges to exclude potential jurors on the basis of race. If such a showing is made, the burden of production then shifts to the State to articulate a race-neutral explanation for the challenges. Finally, the trial court must determine whether the defendant carried his burden of proving purposeful discrimination. *Purkett v. Elem,* 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (Per Curiam); *see State v. Collier,* 553 So.2d 815 (La.1989). The second step does not require an explanation that is persuasive, or even plausible, and unless a discriminatory intent is inherent in the State's explanation, the reason offered will be deemed race neutral. *Purkett,* 514 U.S. at 767, 115 S.Ct. at 1771. The ultimate burden of persuasion remains on the defendant to prove purposeful discrimination. *See State v. Green,* 94-0887, p. 28 (La.5/22/95), 655 So.2d 272, 290, and cases cited therein. A trial judge's determination pertaining to purposeful discrimination rests largely on credibility evaluations; therefore the trial judge's findings are entitled to great deference by the reviewing court. *Batson,* 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21.

As an initial matter, the defense failed to lodge an objection to the State's use of its peremptory challenges against jurors Greg Scott and Thomas Hawkins, Jr.,

although counsel did note for the record that both jurors were African-American.[7] According to defense counsel, when Scott and Hawkins were struck by the State, counsel felt that no "pattern" of exclusion had emerged because the State had accepted an African-American juror, Jeffery Brooks (who was later backstricken by the State).[8] Nevertheless, while defense counsel's choice not to object on *Batson* grounds until they felt a pattern of discrimination had emerged may have been a valid reason for delaying a request for a race-neutral explanation, it does not negate the fact that the State was never requested to provide a race-neutral explanation for its use of peremptory challenges on potential jurors Greg Scott and Thomas Hawkins, Jr. Even after lodging a *Batson* objection and requesting a race-neutral explanation for the State's challenge of other African-Americans, defense counsel never demanded such an explanation for these two jurors.

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[7] When the State excused Greg Scott, defense counsel stated, "I just need to note Mr. Scott is African American. I'd note that for the record. I'm not asking for anything." Rec. vol. 4, p. 831. Later, the State excused Thomas Hawkins, Jr. and defense counsel stated, "Note for the record that Mr. Hawkins is a black juror." Rec. vol. 4, p. 901. The prosecutor responded by asking, "Are you making a challenge that you want me to make –." Rec. vol. 4, p. 901. Defense counsel Vasquez then interjected, stating, "She didn't object." Rec. vol. 4, p. 901. No further discussion of these two jurors occurred.

[8] Defendant also claims in his brief that his trial attorneys rendered ineffective assistance of counsel in failing to lodge a *Batson* objection to the State's use of peremptory challenges against Greg Scott and Thomas Hawkins, Jr. This contention will be addressed later in this opinion.

This court has traditionally applied La.C.Cr.P. art. 841 to errors occurring during voir dire.[9] It has consistently held that a defendant waives review of irregularities in the selection of the jury when an objection is not timely raised. *See State v. Potter,* 591 So.2d 1166, 1168 (La.1991) (failure to make *Batson* objection waived issue on appeal); *State v. Spencer,* 446 So.2d 1197, 1200 (La.1984) (review of improper exclusion of blacks from jury not preserved for appeal); *State v. Whitt,* 404 So.2d 254 (La.1981) (objection to failure to sequester jury at an earlier time waived); *State v. Bazile,* 386 So.2d 349 (La.1980) (improper procedure for selecting venire not reviewable where objection was made after jury was sworn); *State v. Qualls,* 377 So.2d 293, 298 (La.1979) (objection to State's use of peremptory challenges raised for first time on appeal came too late); *State v. Landry,* 262 So.2d 360 (La.1972) (issue waived where objection to three jurors improperly excluded for opposition to death penalty not timely made). With respect to prospective jurors Greg Scott and Thomas Hawkins, Jr., the defense failed to initiate the three-step *Batson* procedure properly and therefore the State did not offer race-neutral reasons for its challenges. Consequently, the trial court did not have the opportunity to rule on them. Defendant therefore waived any claim based upon the prosecutor's allegedly intentional discrimination against Greg Scott and Thomas Hawkins, Jr. and the issue is not properly before this court. *Potter,* 591 So.2d at 1168.

Defense counsel did, however, lodge the proper *Batson* objections to the State's use of peremptory challenges

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[9] La.C.Cr.P. art. 841 provides in pertinent part that "[a]n irregularity or error cannot be availed of after the verdict unless it was objected to at the time of occurrence."

against potential jurors Jeffrey Brooks, Elaine Scott and Loretta Walker. The State originally accepted Brooks as a juror, but later backstruck him. The prosecutor's reasons for striking Brooks were that he appeared "very nervous" throughout questioning and that he would be missing class, as a student teacher, if chosen to serve on the jury. The prosecutor stated, "He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase." Rec. vol. 4, p. 954. Defense counsel responded by stating:

> His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school and whoever it was and the Dean said that wouldn't be a problem. He was told that this would go through the weekend, and he expressed that that was his only concern, that he didn't have any other problems.
>
> As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous.

Rec. vol. 4, p. 955. The court allowed the State to exercise a peremptory challenge on Brooks.[10]

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[10] After the trial court allowed the challenge, defense counsel stated for the record:

> Your Honor, Mr. Brooks was the first African American chosen. The State subsequently proceeded to cut, at this point, it's either three or four and the record will reflect which it is, and the State has now gone back and cut the only African American that they chose. So that that [sic] needs to be on the record.

Rec. vol. 4, p. 956.

With respect to prospective juror Elaine Scott, the district attorney excused her, stating, "I observed she was very weak on her ability to consider the imposition of the death penalty. Her words, exactly – I wrote it down, that she thinks she could, and that's the reason for our challenge." Rec. vol. 4, p. 902. However, when asked again by the prosecution if she could impose the death penalty, she responded, "I could." Rec. vol. 4, p. 860. She also responded affirmatively when asked if she could listen to the evidence and consider whether to accept or reject the insanity defense and hold the defense to its burden of proof. Rec. vol. 4, p. 865-866. Nevertheless, the trial court accepted the State's explanation as race neutral and excused Elaine Scott.

The defense also lodged a *Batson* challenge when Loretta Walker was excused by the State. During voir dire Walker stated that she could not impose the death penalty based on her religious beliefs. Rec. vol. 4, p. 909. After further questioning, she did admit that under certain circumstances, for example if an innocent child was murdered, she could consider the death penalty. Rec. vol. 4, p. 921. Even though she was somewhat rehabilitated by the prosecutor, he excused her, stating, "The reason is very obvious that at first she said she could not do the death penalty for a long-standing, and then she said under a limited circumstance if he killed a child, she could do it. We don't have any evidence that this man killed a child, so." Rec. vol. 4, p. 958. The court allowed the State's challenge of Walker.

The trial court entertained the State's race neutral reasons for the exclusions without making a finding as to whether defendant had made a prima facie showing of purposeful racial discrimination. A trial court's "demand

that a prosecutor justify his use of peremptory strikes is tantamount to a finding that the defense has produced enough evidence to support an inference of discriminatory purpose." *State v. Green,* 94-0887, p. 25 (La.5/22/95), 655 So.2d 272, 288. Nevertheless, the issue of whether the defense established a prima facie case of discrimination is moot once the prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination. *Id.* (applying *Hernandez v. New York,* 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)). Nonetheless, any response will qualify as race neutral "unless a discriminatory intent is inherent in the prosecutor's explanation." *Hernandez v. New York,* 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

Here, the trial court did not find that defendant had established purposeful discrimination and overruled the *Batson* objections. These rulings appear correct. Although not required by the caselaw, the State's proffered reasons were plausible, supported by the record and race-neutral. *See, e.g., State v. Johnson,* 621 So.2d 1167 (La.App. 2 Cir.1993) (veniremen appeared inattentive and unresponsive or failed to maintain eye contact); *State v. McNeil,* 613 So.2d 752 (La.App. 4 Cir.1993) (same); *State v. Young,* 613 So.2d 631 (La.App. 1 Cir.1992) (same); *State v. Manuel,* 517 So.2d 374 (La.App. 5 Cir.1987) (same); *State v. Outley,* 629 So.2d 1243 (La.App. 2 Cir.1993) (veniremen young, inattentive, or knew defense counsel); *State v. Griffin,* 618 So.2d 680 (La.App. 2 Cir.1993) (veniremen all smiles and giggles during voir dire on the death penalty). *See also United States v. Cure,* 996 F.2d 1136 (11th Cir.1993) (venireman inattentive); *cf. Hernandez,* 500 U.S. at 357, 111 S.Ct. at 1868 (State response will qualify as race

neutral "unless a discriminatory intent is inherent in the prosecutor's explanation"). The prosecutor's reasons constituted "legitimate" grounds for the exercise of a peremptory strike. *Purkett v. Elem,* 115 S.Ct. at 1771 ("What [*Batson*] means by a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection."). None of the reasons articulated by the State are readily associated with the suspect class that is alleged to be the object of the State's discriminatory use of peremptory challenges. Defendant, the opponent of the strikes, offered no facts or circumstances supporting an inference that the State exercised its strikes in a racially discriminatory manner. Therefore, the defendant's proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent. *See State v. Green,* 94-0887 at p. 27, 655 So.2d at 289.

After carefully reviewing the entire record of voir dire, we find no abuse of discretion or error by the trial court in its denial of defendant's *Batson* claims. The trial court heard the prospective jurors and concluded there were reasonable bases for the challenges in question. The record does not show that the State employed a tactic of purposeful discrimination in its exercise of peremptory challenges.

Defendant also argues that his attorneys were ineffective for failing to object to the prosecution's improper use of its peremptory challenges to exclude African Americans from the jury. Specifically, defendant points to counsel's failure to raise a *Batson* objection to the State's use of peremptory challenges on veniremen Greg Scott and Thomas Hawkins, Jr. Defendant maintains that his trial counsel erroneously believed that the presence of one African American juror, Jeffrey Brooks (who was later

backstricken by the State) defeated any *Batson* claim. Defendant contends that this error prejudiced him because it allowed the prosecutor to exercise peremptory challenges to remove members of the defendant's race from the jury venire for a discriminatory purpose without having to provide a race-neutral reason.

Even assuming defense counsel erred in failing to make a *Batson* objection to the State's challenges of Greg Scott and Thomas Hawkins, Jr., this failure does not prejudice the defendant to the extent that the trial was rendered unfair and the verdict suspect. In *Allen v. Hardy,* 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986), the United States Supreme Court held that *Batson* would not be applied retroactively on collateral review. The Court noted that retroactive effect is "appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." *Allen,* 478 U.S. at 259, 106 S.Ct. at 2880. The Court found, however, that although "the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial[,] . . . the decision serves other values as well . . . only the first of which may have some impact on truthfinding." *Id.* Because protections afforded by *Batson* did not go "to the heart of the truthfinding function," *Id.,* the Court held that *Batson* would not apply retroactively.

While the instant case does not deal with the question of retroactivity, the Court's comments on the import of *Batson* are pertinent to the considerations present in the prejudice prong of the *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), two-part test used in ineffective assistance of counsel claims. Where a rule does not have "such a fundamental impact on the integrity of factfinding," *Allen,* 478 U.S. at 259, 106 S.Ct.

at 2881, it cannot be said that the violation of such rule renders the trial unfair and the verdict suspect.[11] Thus, counsel's failure to make a *Batson* objection did not prejudice defendant. Accordingly, this argument lacks merit.

Photographs

Defendant next argues that the trial court erred in overruling defense objections to the admissibility of certain State exhibits. Specifically, defendant complains of the introduction into evidence of three autopsy photographs of the non-fatal wound to Howard Wilson's left cheek.[12] Outside the presence of the jury, defense counsel stated the grounds for objecting to the photographs as follows:

> It's a wound from the ear to the mouth, and it was described as a hole in the decedent's face. The deputy testified that you could see into the hole and see the victim's tongue and his teeth.

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[11] As the *Allen* Court noted, the impact of the *Batson* rule is lessened because of the presence of other procedures that protect a defendant's interest in a neutral factfinder:

> Voir dire examination is designed to identify veniremen who are biased so that those persons may be excused through challenges for cause. Moreover, the jury charge typically includes instructions emphasizing that the jurors must not rest their decision on any impermissible factor, such as passion or prejudice.

Allen, 478 U.S. at 259 n.2, 106 S.Ct. at 2881 n.2. These other mechanisms existed prior to the *Batson* decision, "creating a high probability that the individual jurors seated in a particular case were free from bias." *Allen*, 478 U.S. at 259, 106 S.Ct. at 2881.

[12] Although defense counsel does not refer to the specific exhibit numbers, the pictures described in the brief relate to State's Exhibits Nos. 13, 14 and 15.

> Those photographs show exactly that, and I don't think that the jury needs to see those photographs. Dr. Garcia, very fairly in her report, described this wound as nonfatal and in parenthesis, she let's [sic] us know how dramatic it is. She calls it "dramatic-appearing", and I think that that is a clue as to how prejudicial these photographs could be. It was – She clearly described this wound as nonfatal, and she clearly warned us that it was very dramatic-looking.
>
> There is no purpose. It doesn't establish cause of death. It doesn't show the jury anything other than how very gruesome this crime was. That has nothing to do with the very intellectual decision they have to make as to what kind of a murder it was. And this doesn't even show that it was a murder. This man would have fully recovered from this injury to his face, and I don't think that the jury needs to see what has already been testified to on the witness stand.

Rec. vol. 5, p. 1214.

Contrary, however, to defendant's assertions here and the arguments of defense counsel during trial, the State is entitled to the moral force of its evidence. *State v. Robertson,* 97-0177, p. 29 (La.3/4/98), 712 So.2d 8, 32. Postmortem photographs of murder victims are admissible to prove corpus delicti and to corroborate other evidence establishing cause of death and location and placement of wounds, as well as to provide positive identification of the victim. *Robertson,* 97-0177 at p. 29, 712 So.2d at 32; *State v. Koon,* 96-1208 (La.5/20/97), 704 So.2d 756; *State v. Maxie,* 93-2158 (La.4/10/95), 653 So.2d 526; *State v. Martin,* 93-0285 (La.10/17/94), 645 So.2d 190. Photographic evidence will be admitted unless it is so gruesome

that it overwhelms the jurors' reason and leads them to convict defendant without sufficient other evidence, *i.e.*, when the prejudicial effect of the photographs substantially outweighs their probative value. *Robertson,* 97-0177 at p. 29, 712 So.2d at 32; *State v. Perry,* 502 So.2d 543, 558 (La.1986), *cert. denied,* 484 U.S. 872, 108 S.Ct. 205, 98 L.Ed.2d 156 (1987).

A review of the photographs complained of reveals that while the photographs of the wound to decedent's face are particularly graphic, they are relevant to illustrate the number and location of stab wounds to the victim. Additionally, the force necessary to inflict such a wound is also relevant to show defendant's specific intent to kill or to inflict great bodily harm. As such, the photographs' probative value outweighed any prejudicial effect. La. C.E. art. 403. The trial judge did not err in ruling that the photographs were admissible. Consequently, this portion of this assignment of error lacks merit.

Defendant also complains of the admission of another series of photographs which depict him in a variety of martial arts poses. Some photographs depict defendant in a martial arts stance holding a knife-like weapon. Specifically, defendant contends that the photographs were erroneously admitted into evidence because they were remote in time, irrelevant and were introduced solely to prejudice defendant and show defendant was a "bad guy." The State, on the other hand, contends that the photographs were particularly relevant considering the suddenness and savagery of the attacks, the fact that the weapon used was some kind of double-edged knife and defendant's statement that he was "not familiar with, ha, with knives in a way." The State argues the photographs were admissible not only to refute defendant's statement that he was

not familiar with knives, but also to show his obvious skill in using them.

Louisiana C.E. art. 401 provides that evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." All relevant evidence is admissible, except as otherwise provided by law, and irrelevant evidence is not admissible. La. C.E. art. 402. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, or waste of time. La. C.E. art. 403. Additionally, any photographic evidence which illustrates any fact, sheds light upon any issue in the case, or reliably describes a person, place or thing involved in the case, is admissible subject to a La. C.E. art. 403 balancing test. *State v. Lindsey,* 404 So.2d 466 (La.1981).

In the instant case, the determination of whether the photographs at issue are relevant to show the existence of any fact at trial is a close one. The prosecutor argued at trial that the photographs demonstrated defendant's martial arts training and disproved his assertion in his statement to the police that he had acted in self-defense during a struggle with the victim. The photographs, however, were taken more than ten years before trial, before defendant had even met his wife. The photographs were therefore remote in time. Moreover, the State's argument that the photos refute some vague assertion of self-defense made by defendant is also questionable because the fact that defendant had served in the military and had martial arts training did not automatically negate a claim of self-defense. On the other hand, the prosecution's argument

that the pictures refuted defendant's statement that he was not familiar with knives has some merit.[13] The pictures showing defendant posed with the knife-like weapon clearly serve to rebut this statement. Additionally, as the State argues, the photographs can be viewed as evidence of defendant's specific intent to kill as they suggest he has experience and skill in the use of knives as weapons.

Although the photographs are arguably relevant even in light of the fact they were taken more than ten years before the crime occurred, their potential to prejudice the jury is certainly present. Considering the fact that defendant was charged with the brutal stabbing of his wife and her male companion, photographs depicting him in an "attack" position with what look like knives in his hands could give the jury a picture of him as a "bad man" and someone likely to commit such a crime. Thus, the probative value of the photographs was slight when compared to their tremendous potential to inflame the jury.

However, although the trial court arguably erred by admitting the photographs, the error was harmless at the guilt phase. To determine whether an error is harmless, the proper analysis is "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *State*

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[13] When asked to describe the knife he brought with him when he was looking for his wife, defendant told police:

> Well it was a brown and blue handle. It's a steak knife I believe. . . . I'm not familiar with, ha, with knives in a way.

Transcribed Audio Statement, p. 6.

v. Bourque, 622 So.2d 198, 241 n. 20 (quoting *Sullivan v. Louisiana,* 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)) (emphasis in original). In the instant case, the jury heard the testimony of the surviving victim and an eyewitness who described in detail defendant's brutal stabbing of the victim. Additionally, the jury also had access to defendant's inculpatory statements in which he confessed to the crime. In light of the overwhelming evidence against defendant, the erroneous admission of the photographs was unimportant in relation to the entire body of evidence presented at the guilt phase. Accordingly, the jury's rejection of defendant's proffered defenses was "surely unattributable to the error." *Id.* Thus, the trial court's admission of the photographs, even if in error, was harmless at the guilt phase and this portion of the assignment of error lacks merit.

Likewise, the admission of the photographs at the penalty phase was also harmless. An error committed in the penalty phase is harmless if the sentence actually rendered in this trial was surely unattributable to the error.[14] *State v. Bourque,* 622 So.2d at 241 n. 20. At the penalty phase, the complained of photographs paled in comparison to the violence of the crime already described in detail to the jurors and the overwhelming testimony of the various instances of domestic abuse Mary Snyder suffered at the hands of defendant. Testimony revealed that defendant had hit his wife with a baseball bat, threatened to hit her

[14] In *Chapman* and *Sullivan,* the harmless error rule was applied to the jury's decision to convict rather than to its sentencing decision. Nevertheless, the harmless error analysis has subsequently been used in reviewing the alleged prejudicial impact of errors in the penalty phase of capital trials. *See State v. Lee,* 524 So.2d 1176, 1192 n. 4 (La.1987) (on rehearing).

with a hammer, slammed her head into a bedroom wall, smashed her head against a windshield and stabbed her with a screwdriver. The photographs of defendant obviously posing for the camera with knife-like objects did not add any arbitrary factor into the jury's deliberations in light of this testimony. Thus, in this particular case, we conclude there is not a reasonable possibility that the introduction of the photographs at the penalty phase contributed to the sentence and their admission was harmless beyond a reasonable doubt. Consequently, this portion of this assignment of error is without merit.

Prosecutor's Argument

Defendant contends it was reversible error for the prosecutor to refer to the O.J. Simpson case during his closing argument in the penalty phase. Defendant points to the following exchange which occurred during the State's rebuttal argument:

State: Mr. Vasquez [defense counsel] tried to describe this man as being the man who – And it was 12 hours later when he called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of –

Defense: Your Honor, I object. I want to approach on this.

Court: Okay. Counsel, come forward.

(Whereupon, the following is taken at the bench, out of the hearing of the jury.)

Defense: He's going to mention the O.J. Simpson trial.

State: That case –

Defense: I object to that.

State: Your Honor, based upon what he did in this case, where he sat for about 12 hours, he huddled and pretended to kill himself, just like O.J. did and just like O.J. got away it [sic]. I think that's fair –

Defense: That's ridiculous.

State: It's a fair comment and those people will decide what weight they want to give to it.

Defense: Judge, that's –

State: That is as ridiculous as some of the things you said, and I think that's fair comment on something that's common knowledge. And certainly, those people are intelligent enough to give it whatever weight they want to.

Court: I'm going to allow it.

Defense: Note our objection. Please note our objection.

(Whereupon, the following is taken in the hearing of the jury.)

State: The most famous murder case, and all of you all have heard about it, happened in California very, very, very similar to this case. The perpetrator in

> that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that's not what that man was thinking about when he called in and claimed that he was going to kill himself?

Rec. vol. 7, p. 1591. Specifically, defendant alleges the comments by the prosecutor were so prejudicial that they influenced the jury and contributed to their decision to impose the death penalty. Defendant claims that "it has been proved by countless polls that the majority of white Americans believe that O.J. Simpson was guilty of murdering his wife and, by virtue of the not guilty verdict returned in him criminal case, that he 'got away with murder.'" Br. at 27. Consequently, the defense argues, because the defendant is African-American and the jury was all white, the effects of the prosecutor's comments were devastating.

Louisiana C.Cr.P. art. 774 provides that the scope of argument "shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." Article 774 further provides that the argument "shall not appeal to prejudice." Nevertheless, a prosecutor retains "considerable latitude" when making closing arguments. *State v. Taylor,* 93-2201 p. 19 (La.2/28/96), 669 So.2d 364, 374. A conviction or sentence will not be reversed for improper closing argument unless this court is thoroughly convinced the remarks influenced the jury and contributed to the verdict. *Taylor,* 93-2201 at p. 21, 669 So.2d at 375; *State v. Kyles,* 513 So.2d 265, 275

(La.1987); *State v. Knighton,* 436 So.2d 1141, 1152 (La.1983). Even where the prosecutor's statements are improper, credit should be accorded to the good sense and fairmindedness of the jurors who have heard the evidence. *Kyles,* 513 So.2d at 276; *State v. Jarman,* 445 So.2d 1184, 1187 (La.1984).

In the instant case, even assuming the prosecutor's statements regarding the O.J. Simpson case were improper, it cannot be said they created a substantial risk that the death penalty would be imposed under the influence of passion, prejudice or arbitrary factors. Thus, in light of the deference given to the good sense and fairmindedness of jurors and after reviewing the comments as a whole, we are not firmly convinced that they influenced the jury or contributed to the verdict. This portion of the assignment of error is without merit.

Assignments of Error Nos. 3 and 4

In these assignments of error, defendant argues that the trial court erred in failing to continue the trial to allow defense counsel adequate time to prepare and to develop a defense of insanity. Specifically, defendant argues that the trial court's denial of a continuance to allow his antidepressant medication enough time to remedy his unfocused, tangential and circumstantial ideation rendered him unable to effectively communicate with his attorney and therefore unable to assist his counsel. According to the defense, defendant's mental instability at the time of trial, which included difficulties in focusing on questions and in answering them in a coherent manner, caused him to be incapable of testifying in his own defense. Br. at 15.

Prior to the trial, defendant filed a motion to appoint a sanity commission in which it was alleged that defendant had been diagnosed with a depressive disorder since his incarceration and was under the care of the Jefferson Parish Prison psychiatrist, Dr. Richard Richoux. Furthermore, the motion stated that defendant's counsel had noted what she believed "may be a deterioration in defendant's mental capabilities, particularly in relation to his ability to assist in his defense." Specifically, defendant's attorney noted that defendant "appears to counsel to be severely depressed, and has been increasingly unfocused, scattered, and poorly communitative [sic] in interviews. Defendant is unable to answer even simple questions regarding the facts of his case." Rec. vol. 1, p. 144. This motion was granted on July 29, 1996.

On August 1, 1996, defendant was examined for his competency to stand trial by Dr. Debra DePrato, a forensic psychiatrist, and Dr. Barbara McDermott, a clinical psychologist. A sanity hearing was held on August 8, 1996, in which Dr. DePrato testified that in her opinion, defendant "is able to assist in his own defense as well as understand the proceedings against him." Rec. vol. 2, p. 372. However, Dr. DePrato testified that defendant had some difficulty focusing on certain issues and became mildly circumstantial and tangential. Because of these difficulties, Dr. DePrato reiterated the recommendation contained in her report that defendant's medication prescribed for the treatment of depression be changed from Sinequan to Prozac or Zoloft. She testified this change in medication was necessitated by the fact that defendant could only tolerate very low dosages of Sinequan, which did not totally alleviate defendant's symptoms, before bothersome side effects occurred. Regarding this change in medication,

Dr. DePrato testified as follows on cross-examination by defendant's attorney:

> Q. [I]s it your opinion that he needs to have his medication changed because the side effects are making it impossible to up his dosage?
>
> A. Well, there's really two reasons, if I can explain.
>
> Q. Sure.
>
> A. Dr. Richoux has felt that Mr. Snyder was depressed since his incarceration. He's been on Sinequan, off and on, and hasn't been able to take it at times because of the side effects of that medication. So that he hasn't been on it consistently enough, I think for it to help, as well as, if his dosage was increased, it may have helped more. But because of urinary retention, constipation, those kind of side effects, the dosage hasn't been able to be increased. So it's really a combination of things. So that I don't really know that it's been very effective at all, because he hasn't been on it as consistently as he should have been also.
>
> Q. If he were placed on medication which did not cause these side effects so that he could be placed on a proper dosage, how long do you think it would be before the symptoms were alleviated to the point where he could possibly – where the symptoms – where he could possibly focus more?
>
> A. Typically, a medication like I'm recommending, Prozac or Zoloft doesn't interfere with urinary retention problems. So he shouldn't have any problems with that. You can see benefits from one to two weeks in attention and concentration, but full benefits are about six weeks

later. So some people begin to respond immediately while the full maximum potential can take about six weeks.

Q. Okay. And you have made that recommendation, and you have asked that a copy of your report be sent to Dr. Richoux?

A. Yes. I feel the jail would benefit from a copy so we would – they would know our recommendations regarding that since they were concerned about his issue of competency as well.

If I could add one thing about the symptoms, I forgot –

Q. Sure.

A. – to mention. One of the symptoms Mr. Snyder complained about that is probably a side effect of this medication was kind of lightheadedness or feeling cloudy headed which is a common side effect of Sinequan. So if stopped that, that would stop immediately.

Q. Okay.

A. Or get better.

Q. Could I ask you just briefly about your conclusions – you indicate the [sic] he occasionally has difficulty focusing on questions asked of him, and becomes mildly circumstantial and tangential. That's what you were describing a few questions ago?

A. Tangential means getting off the subject, and circumstantial means giving a lot of over-detailed information without really giving the information you need.

> Q. Okay. And Doctor, is it your opinion that a change in medication could alleviate both symptoms that make it difficult to communicate with him?
>
> A. Yes. It could improve those.

Rec. vol. 2, p. 374. Following the testimony of Dr. DePrato, both parties stipulated that if Dr. McDermott, the psychologist who examined defendant along with Dr. DePrato, were called to testify, her testimony would essentially be the same as that of Dr. DePrato. Rec. vol. 2, p. 376.

At the conclusion of the sanity hearing, the trial court found defendant competent to stand trial, stating only, "The Court finds that Mr. Snyder is able to understand the proceedings against him, and is able to assist in his defense. And therefore, is competent to stand trial." Rec. vol. 2, p. 377.

On August 16, 1996, defendant's medication was changed from Sinequan to Prozac by defendant's attending psychiatrist at the Jefferson Parish Correctional Center. Defense counsel then moved for a five-week continuance so that defendant could receive the full benefit of the new medication which would allow his mental state to improve to the point where he could fully assist his counsel. A hearing on this motion was held on August 20, 1996. At this hearing, defense counsel introduced and filed into the record a letter from Dr. Richoux, defendant's attending psychiatrist, to the trial judge which states that effective August 16, 1996, defendant's antidepressant medication had been changed to Prozac and that it would take approximately six weeks for defendant to attain the maximum therapeutic benefits of the new drug. Dr. Richoux informed the court that the change in medication was

necessary because "Mr. Snyder continues to display severe depressive symptoms that may interfere with his ability to assist his attorney. . . ." Although defendant's counsel stated at this hearing that defendant was "technically" competent, her argument was directed at defendant's alleged inability to assist in his own defense. Rec. vol. 2, p. 411. Defense counsel told the court she was requesting a five-week continuance so that defendant could receive the full benefit of the new medication which would allow him to have "every bit of my assistance, which I cannot render adequately at this time." Rec. vol. 2, p. 408.

Although the trial court noted that Dr. Richoux's report stated that defendant's symptoms may interfere with his ability to assist his attorney, rec. vol. 2, p. 410, defendant's request for a continuance was denied. In denying the request, the court stated only, "Well, based on Dr. Deprado's [sic] testimony and in her report that he is – that the symptoms do not interfere with his ability to understand the proceedings against him or to assist in his defense, I'm going to go ahead and deny the motion." Rec. vol. 2, p. 412.

On August 22, 1996, defendant was given a psychological evaluation by Dr. Elaine Salzer, a clinical psychologist. Although she was not called to testify at trial because she was out of town at the time, her report was proffered by the defense. Dr. Salzer's report notes that defendant had been on Prozac for about one week prior to her examination and, at the time of the examination, had not had sufficient time to stabilize on this medication. Dr. Salzer's report also observes that once defendant's condition stabilizes on the medication, it is reasonable to assume that his cognitive processes should become sharper and more focused.

On August 27, 1996, a motion for *in camera* testimony by the defense attorney regarding defendant's ability to assist counsel was filed and heard. In this motion, defense counsel asked that she be allowed to present *in camera* testimony detailing the difficulties she experienced in communicating with defendant which rendered him unable to assist in his defense and therefore rendered her assistance ineffective. Defendant's attorney sought to give this testimony *in camera,* out of the presence of the Assistant District Attorney, because of the confidential nature of the attorney-client communications at issue. The trial court summarily denied the motion for *in camera* testimony, but allowed defense counsel to testify in open court as to her concerns regarding matters of a non-confidential nature. Defendant's attorney testified that her representation of Mr. Snyder had been compromised by his state of mind, due to the fact that he had been severely depressed and inadequately treated. Rec. vol. 2, p. 474.

As a general matter, the decision to grant or deny a motion for continuance rests within the sound discretion of the trial judge, and a reviewing court will not disturb a trial court's determination absent a clear abuse of discretion. La. C.Cr.P. art. 712; *State v. Strickland,* 94-0025, p. 23 (La.11/1/96), 683 So.2d 218, 229; *State v. Bourque,* 622 So.2d 198, 224 (La.1993), *overruled on other grounds by State v. Comeaux,* 93-2729 (La.7/1/97), 699 So.2d 16. Whether a refusal to grant a continuance was justified depends on the circumstances of the particular case presented. *State v. Bourque,* 622 So.2d at 224; *State v. Simpson,* 403 So.2d 1214, 1216 (La.1981). Generally, this court declines to reverse convictions for improper denial of a motion to continue absent a showing of specific prejudice.

State v. Strickland, 94-0025 at p. 23, 683 So.2d at 229; *State v. Gaskin,* 412 So.2d 1007, 1011 (La.1982).

Limits on the court's discretion to grant or deny a continuance, however, are imposed by defendant's constitutional rights, including his rights to understand the proceedings against him, to assist in his defense, and to the assistance of counsel. *See United States v. Soldevila-Lopez,* 17 F.3d 480, 487 (1st Cir.1994). If a defendant lacks the ability to communicate effectively with counsel, he may be unable to exercise other rights deemed essential to a fair trial. *Cooper v. Oklahoma,* 517 U.S. 348, 364, 116 S.Ct. 1373, 1381, 134 L.Ed.2d 48 (1996). Constitutional due process requires that the trial of an accused be conducted only when he is legally competent. *Bishop v. United States,* 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956); *State v. Nomey,* 613 So.2d 157 (La.1993). The test for determining defendant's mental competency depends upon "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States,* 362 U.S. 402, 403, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). Defendant's allegations that he was unable to communicate with his attorney thus raise serious constitutional issues. Because the record reflects that the trial court failed to make further inquiry into defendant's claims that he needed to be stabilized on his new medication in order to effectively communicate with his counsel and assist in his defense when such claims, combined with objective medical evidence, raised a sufficient doubt as to defendant's competence, we must question whether defendant received a fair trial in this regard.

In *Drope v. Missouri,* 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), the Court reversed petitioner's conviction because the record before it revealed that the lower courts failed to give proper weight to information suggesting petitioner's incompetence that came to light during trial. The Court found that the failure to make further inquiry into petitioner's competence to stand trial denied him a fair trial. In reaching its conclusion, the Court stated:

> The sentencing judge and the Missouri Court of Appeals concluded that the psychiatric evaluation of petitioner attached to his pretrial motion for a continuance did not contain sufficient indicia of incompetence to stand trial to require further inquiry. Both courts mentioned aspects of the report suggesting competence, such as the impressions that petitioner did not have 'any delusions, illusions, hallucinations . . . ,' was 'well oriented in all spheres,' and 'was able, without trouble, to answer questions testing judgment,' but neither court mentioned the contrary data. The report also showed that petitioner, although cooperative in the examination, 'had difficulty in participating well,' 'had a difficult time relating,' and that he 'was markedly circumstantial and irrelevant in his speech.' In addition, neither court felt that petitioner's episodic irrational acts described in the report or the psychiatrist's diagnoses of '(b)orderline mental deficiency' and '(c)hronic (a)nxiety reaction with depression' created a sufficient doubt of competence to require further inquiry.

Id. at 175, 95 S.Ct. at 905.

The Court noted that it did not appear the examining psychiatrist was asked to specifically consider the issue of

petitioner's competence to stand trial and, like the report itself, the petitioner's "somewhat inartfully drawn motion for a continuance" did not clearly suggest that petitioner's competence to stand trial was the question sought to be resolved. However, it found the sentencing judge erred in concluding that counsel's pretrial contention that "the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial" did not raise the issue of petitioner's competence to stand trial. Finally, the Court concluded that at the stage at which the pretrial motion for continuance was filed, "it would have been, at the very least, the better practice to order an immediate examination under [Missouri law]." *Id.* at 177, 95 S.Ct. at 906.

Similarly, in *Pate v. Robinson,* 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), the Court held that the failure to observe procedures adequate to protect a defendant's right not to be tried while incompetent deprives him of his due process right to a fair trial. There, the Court expressed doubt as to whether a defendant can waive the defense of his competence to stand trial, stating, "But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Id.* at 384, 86 S.Ct. at 841. The Court also noted that even when a defendant does not explicitly state that competence to stand trial is at issue, trial judges must consider the question of competency where the evidence presented raises a doubt as to defendant's competence. *Id.* at 384 n. 6, 86 S.Ct. at 841 n. 6.

Thus, if there is a sufficient doubt as to the mental competency of an accused, the trial court has a responsibility to order a hearing *sua sponte. Griffin v. Lockhart,* 935

F.2d 926 (8th Cir.1991). The *Pate* procedural guarantee is violated when, in light of what was then known to the trial court, the failure to make further inquiry into defendant's competence to stand trial denied him a fair trial. *Lokos v. Capps,* 625 F.2d 1258, 1261 (5th Cir.1980) (citing *Drope,* 420 U.S. at 174, 95 S.Ct. at 905). The relevant question is: "Did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about defendant's competency and alerted him to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos,* 625 F.2d at 1261.

Although defendant's counsel stated in the hearing on the motion to continue that defendant was "technically" competent, her arguments raised the issue of whether defendant could communicate with her well enough to allow her to effectively assist him. A comprehensive reading of her arguments regarding defendant's inability to communicate leads us to believe that defense counsel's statements which seemingly concede defendant's competence actually referred to that prong of competence relating to defendant's capacity to understand the proceedings against him. Obviously, her complaints of difficulty in communicating with defendant which hindered her ability to assist him and her references to Dr. Richoux's letter which stated that defendant's depressive symptoms may interfere with his ability to assist his attorney relate to defendant's ability to assist in his defense. These complaints, coupled with the medical evidence presented, while not necessarily dispositive of the competency issue, were nevertheless sufficient to warrant the trial court's attention. Its failure to further inquire into defense allegations that

defendant was experiencing difficulties in communicating with his attorney was therefore error.

At the time defendant's motion to continue the trial was heard, the trial court had before it the report and testimony of a psychiatrist and a clinical psychologist which opined that defendant was competent to stand trial, but had difficulty focusing on questions asked of him and became mildly circumstantial and tangential and consequently would benefit from a change in medication to control his depressive disorder. Additionally, testimony revealed that once this change in medication occurred, it would take six weeks for defendant to receive the maximum benefits of the new drug. Moreover, the trial court had before it a letter from defendant's attending psychiatrist stating that defendant's medication had been changed because of defendant's display of severe depressive symptoms "that may interfere with his ability to assist his attorney" and that it would take approximately six weeks for defendant to attain the maximum therapeutic benefits of the new medication. The trial court was also aware of defense counsel's allegations that defendant's thinking was attenuated and he needed to be stabilized on the new medication before he could adequately assist in his defense. This evidence, centering on defendant's difficulties in communicating and alleged inability to assist counsel, should have raised a question of defendant's competence in the judge's mind. As was noted in *Cooper v. Oklahoma,* 517 U.S. 348, 354 n. 4, 116 S.Ct. 1373, 1377 n. 4, 134 L.Ed.2d 498 (1996), "Indeed, the right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request

for a competency determination." *See also* La.C.Cr.P. art. 642.[15] This is nevertheless true even in the face of defense counsel's statements that she was not asking for the continuance on the ground of defendant's incompetence, for, as noted above, her arguments were actually directed to his competence and it is doubtful that defendant can waive his due process right not to stand trial while incompetent.

With all of the evidence before it that at least raised some question as to defendant's competency, particularly as to his ability to assist counsel before he was fully stabilized on new medication, the trial court failed to make any investigation into the validity of these concerns. The trial judge did not, for example, interview defendant on the record nor did he ask defense counsel to elaborate on the problems defendant was experiencing. In fact, when defense counsel asked to give the court specific examples of the difficulties she was encountering, she was summarily denied the opportunity to do so. It is not that we believe defendant was in fact unable to assist his attorney or that he was otherwise incompetent. Rather, it is the trial court's absolute failure to investigate these claims, which were substantiated by objective medical evidence,

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[15] La.C.Cr.P. art. 642 provides:

> The defendant's mental incapacity to proceed may be raised at any time by the defense, the district attorney, *or the court*. When the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed.

(Emphasis added.)

that causes us to determine he abused his discretion in failing to investigate defense claims of incompetence.

Although Drs. DePrato and McDermott concluded that defendant was able to understand the proceedings against him and was able to assist in his own defense at the time of their evaluation of him, the trial court could not base its decision regarding defendant's competency solely on the conclusions of these doctors, especially in light of the medical evidence presented after the evaluation was completed. As we noted in *State v. Bennett,* 345 So.2d 1129, 1137 (La.1977) (on rehearing), "[T]he trial court may not rely so extensively upon medical testimony as to commit the ultimate decision of competency to the physician." The facts to consider in determining a defendant's ability to assist in his defense include: whether he is able to recall and relate facts pertaining to his actions and whereabouts at certain times; whether he is able to assist counsel in locating and examining relevant witnesses; whether he is able to maintain a consistent defense; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements; whether he has the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he is capable of testifying in his own defense; and to what extent, if any, his mental condition is apt to deteriorate under the stress of trial. *Bennett,* 345 So.2d at 1138. The record contains no evidence that the trial court considered any of these factors when the question of defendant's ability to assist in his own defense was raised.

Had the record in this case contained some affirmative evidence that the trial judge conducted any investigation into defense allegations that defendant could not

assist his counsel, our result may have been different. For example, in *United States v. Lopez,* 71 F.3d 954 (1st Cir.1995), *abrogated on other grounds by United States v. Wells,* 519 U.S. 482, 117 S.Ct. 921, 137 L.Ed.2d 107 (1997), defendant learned he had a small brain lesion or tumor about two weeks into his trial. After a recess, a hearing was held to consider defendant's motions for a mistrial based on lack of competency or for a continuance for purposes of treatment. The court observed that defendant was not claiming that he was incompetent; instead, he argued that the trial court's failure to halt the proceedings so that defendant could have surgery violated his constitutional rights by imposing a regime of medication that so impaired his abilities that he was unable to testify coherently on his own behalf. The basis of defendant's arguments was that medications prescribed for his condition caused side effects, such as grogginess, that interfered with his ability to proceed and his attorneys stated that defendant had problems communicating with them and was not able to cooperate fully. Following several examinations by doctors and its own observations, the trial court denied the motion and the trial continued, with defendant testifying in his own defense. The court of appeals, citing the careful investigation of the trial court into the matter, found no abuse of discretion, stating:

> Lopez' health obviously warranted an inquiry by the trial judge. Far from ignoring the issue, the trial court deferred trial for a substantial period, summoned medical experts one after another, took an active role in securing diagnoses for Lopez, had him re-examined repeatedly, and took testimony and made findings in abundance, including a detailed post-trial order summarizing

> the court's findings and reasons for proceeding with trial.
>
> * * *
>
> Lopez' main trial counsel did protest at times that his client was not able to cooperate fully; but these complaints of Lopez' conduct during trial are balanced, if not outweighed, by the district court's findings that Lopez appeared to be well oriented and was cooperating with counsel.

Id. at 958.

Other courts have also affirmed a trial court's denial of a continuance in circumstances similar to the ones presented in *Lopez,* but in those cases the record clearly supported the trial court's decision. The defendant in *United States v. Moore,* 27 F.3d 969 (4th Cir.1994) requested a continuance, contending he was physically and psychologically unable to stand trial and psychologically unable to assist in his defense. After a hearing on the motion in which a letter from defendant's psychiatrist was produced which stated that defendant was suffering anxiety and depression that impaired his ability to assist in his defense, the court denied the motion. The appellate court declined to reverse the court's ruling, finding that sufficient evidence was presented to support the trial court's ruling. For example, defendant's counsel conceded that defendant had actively participated in readying his defense by contacting and interviewing witnesses, preparing documents and working closely with his attorneys. Additionally, the trial court observed on the record that defendant "did not appear to be in any acute distress and consulted with his counsel throughout the proceedings." *Moore,* 27 F.3d at 973. In *United States v. Nasim,* 932 F.2d 964 (4th Cir.1991) (unpublished per curiam), defendant

moved for a continuance based on the unavailability of medications prescribed by his doctor. The trial court denied the motion. The court of appeals found no abuse of discretion in the denial because defense counsel advised the court that his client was able to communicate with him about the issues in the case and the trial court itself noted that defendant sounded "perfectly rational." Finally, in *Fisher v. State,* 736 P.2d 1003 (Okla.Crim.App.1987), defendant requested a continuance during his trial, contending he had taken two tablets of Mellaril to control his anxiety which he had "saved" from the jail and the medication made him feel intoxicated, drowsy and unable to think clearly. The trial court conducted an *in camera* hearing at which defendant's doctor testified that even if defendant had taken two tablets at the time he said he did, the effects of the medication would have worn off in six hours and two witnesses testified that defendant acted no differently on this day than on any other and did not appear to be under the influence of any drugs. The trial court denied the motion, stating that even if he had taken the medication, defendant's ability to think or to communicate had not been impaired. Defendant then took the stand and testified coherently in his own defense. The reviewing court held that, on the record before it, it could not find an abuse of discretion in the trial court's denial.

Unlike the records present in the cases discussed above, the record before us gives us no basis upon which to determine that the trial court did not err in failing to make further inquiry into defendant's competency. In contrast to the *Lopez* court, the trial court in this case did not undertake any investigation into the allegations made by defense counsel that defendant was having difficulties communicating with her. Such an investigation was

warranted in light of the fact that Drs. DePrato, McDermott, Richoux and Salzer all believed that defendant's condition necessitated the change in medication and that it would take approximately six weeks for the drug to reach its maximum effectiveness. There is no affirmative indication on the record by the judge, the district attorney or the defense attorneys that the defendant could, in fact, or did, in fact, assist his attorney. Furthermore, defendant did not testify in either phase of his trial, so we cannot review his testimony and determine whether he had any significant difficulties in communicating. Finally, when defendant's counsel offered to specify for the record the difficulties she was experiencing in attempting to represent defendant, she was prevented from doing so by the trial judge. For all of these reasons, we cannot say with certainty whether defendant received a fair trial. Consequently, the record before us does not permit us to find that the trial court did not err in failing to make further inquiry into defendant's competency.

Having found that the trial court abused its discretion in failing to investigate defendant's claims of incompetency, we must now determine the proper remedy. In the instant situation, we believe a nunc pro tunc hearing to determine whether defendant was competent at the time of his trial is appropriate if a meaningful inquiry into defendant's competency can still be had.

In *State v. Nomey,* 613 So.2d 157 (La.1993), defendant was allowed to plead guilty to first degree murder one day after the members of a sanity commission conducted their examinations. In a motion for post-conviction relief, defendant argued the trial court's failure to conduct a hearing on the issue of his sanity prior to accepting his guilty plea violated his due process rights. The trial court

denied the request for post-conviction relief, but on appeal the court of appeal ordered the trial court to conduct an evidentiary hearing to determine defendant's capacity to proceed at the time of the entry of the plea. After the hearing, the trial court held defendant had the capacity to proceed when the plea was entered. The court of appeal affirmed this determination. This court held the court of appeal erred in remanding the case for a retroactive sanity hearing because the trial court's acceptance of the plea without first resolving the issue of defendant's competency violated defendant's due process rights. The court did, however, note the following:

> The present case is distinguishable from a case such as *State v. Bennett,* 345 So.2d 1129 (La.1977). In *Bennett,* the sanity hearing was held, but the examining physicians admitted that they could not be certain of their results without further clinical evaluation of defendant. The trial judge failed to order additional testing upon defendant's request. Defendant was thereafter found guilty as charged by a jury. On appeal, we remanded for another sanity hearing following a complete reexamination of the defendant. Unlike the present case, the defendant in *Bennett* did receive a hearing, at which the members of the sanity commission testified. Further, the defendant in *Bennett* alleged he suffered from mental retardation, which we found to be a more static condition than mental illness. Hence, under certain limited circumstances, a retroactive determination of sanity may be permissible. Likewise, we do not mean to foreclose the possibility of a nunc pro tunc competency hearing, if a meaningful inquiry into defendant's competence can still be had, in those cases where the trial judge ignores a bona fide doubt as to defendant's competence to

> stand trial, or the issue of competence is not raised at trial. *See Lokos v. Capps,* 625 F.2d 1258 (5th Cir.1980); *Zapata v. Estelle,* 588 F.2d 1017 (5th Cir.1979). Those cases are not applicable to the present case, however, since defendant *did* raise the issue of competence prior to trial and the trial judge agreed there was reasonable ground for a mental examination under La.Code Crim.P. art. 643.

Nomey, 613 So.2d at 162 n. 8. Thus, *Nomey* does not preclude the possibility of a nunc pro tunc competency hearing in a case such as the one *sub judice* where the trial judge ignored a bona fide doubt as to defendant's competence to stand trial.

The federal courts of appeals, although noting that retrospective competency hearings are not favored, have allowed nunc pro tunc hearings on the issue of competency if a meaningful inquiry into the defendant's competency can still be had. *See, e.g., Reynolds v. Norris,* 86 F.3d 796 (8th Cir.1996); *Watts v. Singletary,* 87 F.3d 1282 (11th Cir.1996); *United States v. Renfroe,* 825 F.2d 763 (3rd Cir.1987); *Zapata v. Estelle,* 588 F.2d 1017 (5th Cir.1979). The trial court is in the best position to determine whether it can make a retrospective determination of defendant's competency during his trial and sentencing. *Renfroe,* 825 F.2d at 767. The determination of whether a trial court can hold a meaningful retrospective competency hearing is necessarily decided on a case-by-case basis. *Miller v. Dugger,* 838 F.2d 1530 (11th Cir.1988). The State bears the burden to show the court that the tools of rational decision

are available. *Lokos v. Capps,* 625 F.2d 1258 (5th Cir.1980).[16]

A "meaningful" determination is possible "where the state of the record, together with such additional evidence as may be relevant and available, permits an accurate assessment of the defendant's condition at the time of the original state proceedings." *Reynolds,* 86 F.3d at 802. Additionally, "[w]hen determining whether a meaningful hearing may be held, we look to the existence of contemporaneous medical evidence, the recollections of non-experts who had the opportunity to interact with the defendant during the relevant period, statements by the defendant in the trial transcript, and the existence of medical records. The passage of time is not an insurmountable obstacle if sufficient contemporaneous information is available." *Reynolds,* 86 F.3d at 803 (citations omitted). The court in *Miller v. Dugger,* 838 F.2d 1530 (11th Cir.1988) noted that it had never given the district courts a list of factors that must be met in order to determine that a nunc pro tunc determination of competency is possible, but stated that relevant factors include time, availability of witnesses and the existence of evidence on the state record about the defendant's mental state at the time.

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[16] The State bears this burden because a nunc pro tunc competency hearing is essentially "a harmless error determination in disguise." *James v. Singletary,* 957 F.2d 1562, 1571, n. 14 (11th Cir.1992). The *James* court reached this conclusion because "*Pate,* in essence, established a rebuttable presumption of incompetency upon a showing by a habeas petitioner that the state trial court failed to hold a competency hearing on its own initiative despite information raising a bona fide doubt as to the petitioner's competency. According to *Pate,* the state could rebut this presumption by proving that the petitioner in fact had been competent at the time of trial." *Id.* at 1570 (footnote omitted).

Because we believe a nunc pro tunc competency hearing may be possible to rectify the trial court's error in failing to make further inquiry into defendant's competency prior to trial, we will remand the case to the trial court for the sole purpose of determining whether such a hearing is now possible and, if so, to conduct such an evidentiary hearing. Because of the sparse testimony before the trial court, we envision the taking of additional testimony and evidence, including medical testimony relating to defendant's mental condition during that time prior to trial when he was allegedly unstabilized on his new medication and the records of examining physicians made during that time period, to allow the trial court to determine whether defendant was competent.[17] *See Renfroe,* 825 F.2d at 767. If the trial court concludes defendant was competent, no new trial is required to be conducted. *United States v. Haywood,* 155 F.3d 674 (3rd Cir.1998). If the trial court finds a meaningful inquiry cannot be had, or if it determines after the hearing that defendant was not competent at the time of his trial,

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[17] We note that defendant was examined by Drs. Richoux, Deland and Salzer during this time period. Additionally, there is some implication in the record that Dr. Hannie examined defendant during this period. Rec. vol. 2, p. 472. There is no indication when defendant was examined by Dr. Davis, although his testimony and records would certainly be relevant if he also examined defendant at the time he was allegedly unstabilized on his medication. The testimony of doctors or mental health experts who conducted mental examinations close to the trial date increase the probability that the nunc pro tunc hearing will not be unduly speculative. *United States v. Makris,* 535 F.2d 899, 904 (5th Cir.1976). One reason we believe remanding this case to the trial court for it to consider whether a meaningful inquiry into defendant's competence can still be had is appropriate is because defendant was examined by several mental health professionals close to his trial date.

defendant shall be entitled to a new trial.[18] *See United States v. Mason,* 52 F.3d 1286 (4th Cir.1995); *Zapata v. Estelle,* 588 F.2d 1017 (5th Cir.1979).

In a related assignment of error, defendant argues that the trial court erred in failing to grant a continuance to give defense counsel more time to prepare. According to the defense, counsel for defendant's penalty phase received his appointment to represent defendant on May 3, 1996, with a trial date on a charge of first degree murder set for August 27, 1996.[19] Prior to trial, defendant filed a second motion for continuance alleging that the penalty phase attorney would only have three and one-half months from the date of his appointment (and two months from the date the State announced it would seek the death penalty) in which to prepare defendant's penalty phase defense. The defense alleged that although it had undertaken "an aggressive effort to investigate the case for mitigation and to prepare its presentation" it needed an additional thirty days to adequately prepare. In a separate motion for continuance, the penalty phase attorney again requested a continuance based on the fact that he had participated in another first degree murder trial beginning on July 22, 1996, and lasting ten days. As a result of the time spent

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[18] We need not address whether the trial court abused its discretion in denying the continuance based on defendant's alleged inability to communicate with his counsel because if defendant is found competent after a nunc pro tunc hearing, the denial of the continuance did not constitute an abuse of the trial court's discretion and if defendant is found incompetent, or if a meaningful inquiry cannot be had, the denial of the continuance was obviously an abuse of discretion and per se prejudicial.

[19] Defendant represents that prior to that time he was represented by Dale Cannizzaro, who withdrew from the case for medical reasons without filing any pretrial motions in the case.

preparing for and conducting that trial, defendant's counsel alleged he had less than four weeks to investigate and prepare defendant's mitigation case which included conducting interviews in defendant's hometown of Waterproof, Louisiana, three hours away from counsel's office. After the hearings on these motions, the trial court denied both without reasons.

The denial of a motion for continuance on grounds of counsel's lack of preparedness does not warrant reversal unless counsel demonstrates specific prejudice resulting from the denial. *State v. Haarala,* 398 So.2d 1093, 1099 (La.1981). This specific prejudice requirement has been disregarded by this court in cases where the preparation time was so minimal as to call into question the basic fairness of the proceeding. *State v. Jones,* 395 So.2d 751 (La.1981); *State v. Durio,* 371 So.2d 1158 (La.1979). This court has also held that when preparation time is unreasonably short, counsel has been diligent, and there is a general allegation of prejudice, denial of a motion for a continuance is an abuse of discretion which constitutes reversible error. *Durio,* 371 So.2d at 1161; *State v. Winston,* 327 So.2d 380 (La.1976) (conviction for distribution of heroin reversed when defense counsel was given only three days in which to prepare for trial); *State v. Simpson,* 403 So.2d 1214 (La.1981) (trial court constructively denied defendant right to counsel by appointing new attorney on the day of trial who presented no defense, but only cross-examined the State's witnesses).

In the instant case, even if we assume counsel had four weeks to prepare for the penalty phase of defendant's trial, we cannot say that such an extended period of time was so unreasonably short as to call into question the basic fairness of the proceeding. The situation at hand

falls outside the ambit of *Simpson* and *Durio* because defense counsel had an adequate amount of time to prepare for trial. Thus, for the trial court's denial of the motion for continuance based on this ground to constitute reversible error, defense counsel must be able to demonstrate specific prejudice resulting from the denial. Counsel here has not made any specific allegations of prejudice resulting from the denial of this particular motion for continuance, nor has he shown how the mitigation defense was in any way impaired by the denial. *See generally State v. Dupre,* 408 So.2d 1229, 1231 (La.1982). The defense presented seven witnesses in the penalty phase, including a social worker who prepared defendant's psychosocial history, a forensic psychiatrist who examined defendant, defendant's sister, his mother, his former employer, his neighbor and a childhood friend. Defendant's penalty phase counsel obviously had adequate time to develop mitigating evidence. We therefore cannot say either that the trial court abused its discretion in denying the motion for continuance on this ground or that the denial of the motion deprived defendant of a fair trial. The denial did not result in any specific material prejudice to defendant. This portion of this assignment of error lacks merit.

Defense counsel also argues defendant's guilt phase attorney had insufficient time to prepare and thus the motion for continuance to allow counsel additional time to prepare should have been granted. Here, counsel who conducted the guilt phase of defendant's trial was appointed by the trial court to represent defendant on September 28, 1995, eleven months prior to trial. Rec. vol. 1, p. 39. Defense counsel, however, represented to the court that she was only notified of her appointment "at the end of April," some four months before defendant's trial.

Rec. vol. 2, p. 332. Even so, defense counsel had an adequate amount of time to prepare for defendant's trial. While four months is not an extensive time to prepare for a capital case, it nonetheless appears sufficient. Furthermore, counsel has not made any specific allegations of prejudice resulting from the denial as to this counsel. Because we cannot say the trial court abused its discretion in denying the continuance on this ground and because no prejudice resulting from the denial has been shown, this portion of the assignment of error lacks merit.

In a related argument, defendant argues that both the time constraints appointed counsel acted under and the mental health problems of defendant combined to destroy defendant's Sixth Amendment right to reasonably competent counsel in the guilt phase of trial under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A claim for ineffective assistance of counsel is generally raised in an application for post-conviction relief. *State v. Burkhalter,* 428 So.2d 449, 456 (La.1983). Post-conviction proceedings enable the district judge to conduct a full evidentiary hearing on the matter. *State v. Hamilton,* 92-2639, p. 4 (La.7/1/97), 699 So.2d 29, 31; *State v. Seiss,* 428 So.2d 444, 449 (La.1983). This court has, however, addressed ineffective assistance of counsel claims on direct review where the record discloses the evidence necessary to decide the issue. *State v. Ratcliff,* 416 So.2d 528, 530 (La.1982). In the present case, however, if the trial court finds on remand that defendant was not able to assist his counsel at the time of trial and therefore reverses defendant's conviction and sentence, defendant's argument of ineffective assistance of counsel at the guilt phase becomes moot. If, on the other hand, the trial court finds defendant was competent at the time of trial, the

issue of ineffective assistance of counsel is relegated to post-conviction proceedings as the record does not contain sufficient evidence for this court to fully explore this issue.

Prior to trial, the defense also moved for a continuance based on the fact that one of defendant's mental health experts "has been unable to complete [psychological] testing of the defendant due to the time constraints attendant to the August 27 trial date." In a related motion heard at the same time, defendant again asked for a continuance because this same expert, Dr. Elaine Salzer, would be out of town during the trial. The trial court denied both motions without reasons.

Dr. Salzer's report was proffered by the defense at the penalty phase of defendant's trial. The report indicated that defendant was tested August 22, 1996. The report authored by Dr. Salzer appears to be comprehensive and does not suggest that her findings were incomplete or inadequate due to a lack of time before trial. Consequently, we cannot conclude that the trial court abused its discretion in failing to grant a continuance on this ground or that defendant was prejudiced by the denial.

Defendant also argues the trial court should have granted a continuance because Dr. Salzer was out of town for the duration of the trial and he wanted to call her as a witness during the penalty phase of his trial. Although the State offered to stipulate that Dr. Salzer would testify consistent with her report, the defense refused to so stipulate, claiming it did "not want this report coming in without her testimony." Rec. vol. 6, p. 1374. The trial court denied the motion for the continuance and accepted defense counsel's proffer of the report for purposes of appellate review.

A motion for a continuance based on the absence of a missing witness must state the facts to which the absent witness is expected to testify, showing the materiality of the testimony and the necessity for the presence of the witness at the trial, circumstances showing the availability of the witness at the time to which the trial is deferred, and facts showing due diligence used in an effort to procure attendance of the witness. La.C.Cr.P. art. 709; *State v. Rogers,* 553 So.2d 453 (La.1989); *State v. Jackson,* 450 So.2d 621 (La.1984). Generally, the "due diligence" requirement of Article 709 is not satisfied when defense counsel fails to have the potential witness subpoenaed. *State v. Atkins,* 360 So.2d 1341 (La.1978); *State v. Terry,* 359 So.2d 172 (La.1978); *State v. Bennett,* 341 So.2d 847 (La.1976); *State v. Elias,* 230 La. 498, 89 So.2d 51 (1956). The record contains no evidence that Dr. Salzer was ever subpoenaed or that defendant attempted to obtain her presence in any way. Furthermore, at the hearing on the motion to continue the penalty phase based on Dr. Salzer's absence, the State argued that she had never been subpoenaed and the defense did not contradict this assertion. As such, we cannot say that the trial court abused its discretion in failing to continue the penalty phase based on Dr. Salzer's absence.

Assignment of Error No. 5

Finally, in his last assignment of error, defendant argues the trial court erred in denying his motion for a new trial filed pursuant to La.C.Cr.P. art. 851.[20] Defendant

[20] La.C.Cr.P. art. 851 states:

> The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such

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made the same allegations in his motion for a new trial that he presents in the instant appeal: (1) that the verdict is contrary to the law and evidence;[21] (2) that the court's

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is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.

The court, on motion of the defendant, shall grant a new trial whenever:

(1) The verdict is contrary to the law and the evidence;

(2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error;

(3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty;

(4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment; or

(5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

[21] Defendant frames one of his claims as an error by the trial court in denying his motion for new trial under La.C.Cr.P. art. 851(1) (trial court shall grant a new trial when the verdict is contrary to the law and the evidence) and also asks the court to examine the evidence under the *Jackson v. Virginia* standard. However, a motion for new trial presents only the issue of the weight of the evidence, *see Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) (setting aside a verdict as against the weight of the evidence, as opposed to the insufficiency of the evidence, under the Due Process Clause does not bar retrial) and is examined under the so-called thirteenth juror standard under which the trial judge re-weighs the evidence. *State v. Voorhies*, 590 So.2d 776, 777 (La.App. 3 Cir.1991). The question of sufficiency is properly raised

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ruling on both written motions, and objections made during the proceedings, show prejudicial error, including a *Batson* motion made during voir dire but then specifically supplemented to include other court rulings; (3) that the court erred in failing to continue the trial to allow defense counsel time to prepare; (4) that the court erred in failing to continue the trial to give defense counsel sufficient time to develop a defense of insanity, then specifically supplemented to include the defense's inability to communicate with the defendant at trial and (5) that the ends of justice would be served by the granting of a new trial, both as to the guilt phase and penalty phase.[22] However, as discussed

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by a motion for post-verdict judgment of acquittal. La.C.Cr.P. art. 821; *State v. Demery*, 28,396, p. 6 (La.App. 2 Cir.8/21/96), 679 So.2d 518, 522. *But see* Article 851 comment (d) ("[i]t is the duty of the trial judge to pass upon the sufficiency of the evidence" once ground (1) is raised under Article 851).

In the instant case, the constitutional issue of sufficiency is treated in assignment of error number 1 because the denial of a motion for new trial based upon La.C.Cr.P. art. 851(1) is not subject to review on appeal. *State v. Skelton*, 340 So.2d 256, 259 (La.1976) ("[W]e have uniformly held that a bill of exceptions reserved to the refusal of the trial judge to grant a motion for a new trial based on Article 851(1), relative to sufficiency of the evidence presents nothing for our review.") (citations omitted); *State v. Bartley*, 329 So.2d 431, 433 (La.1976) ("It is well established in Louisiana that an assignment of error reserved to the denial of a motion for a new trial alleging that the verdict is contrary to the law and the evidence presents nothing for appellate review.") (citations omitted).

[22] It is settled that a judgment on these grounds (invariably denying the motion) is unreviewable by an appellate court, which may review the grant or denial of a new trial only "for error of law." La.C.Cr.P. art. 858. *See State v. Thomer*, 395 So.2d 1320, 1328 (La.1981) (grant or denial of a new trial under Article 851(5) "presents nothing for this Court's appellate review"); *State v. Williams*, 343 So.2d 1026, 1037 (La.1977) (same), *cert. denied*, 434 U.S. 928, 98 S.Ct. 412, 54 L.Ed.2d 287 (1977); *State v. Cortez*, 503 So.2d 76, 78 (La.App. 5 Cir.1987)

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above, with the exception of the trial court's denial of defendant's motion for continuance based upon his alleged inability to communicate with his counsel, there is no error in the trial court's denial of his motion for a new trial. *Cf. State v. Strickland,* 94-0025, p. 51 (La.11/1/96), 683 So.2d 218, 239 (harmless errors, however numerous, do not aggregate to reach the level of reversible error); *State v. Taylor,* 93-2201 (La.2/28/96), 669 So.2d 364 (unpub'd appx.); *State v. Tart,* 93-0772 (La.2/9/96), 672 So.2d 116; *State v. Copeland,* 530 So.2d 526, 544 (La.1988) (citing *State v. Graham,* 422 So.2d 123, 137 (La.1982)); *State v. Sheppard,* 350 So.2d 615, 651 (La.1977); *see also State v. Smith,* 95-1826, p. 20 (La.App. 1 Cir.9/27/96), 681 So.2d 980, 994; *Foster v. State,* 639 So.2d 1263, 1303 (Miss.1994) (finding no "near errors" and so rejecting cumulative error analysis). *Cf. Mullen v. Blackburn,* 808 F.2d at 1143, 1147 (5th Cir.1987) (court rejects cumulative error claim and finds that "twenty times zero equals zero"). Those assignments of error which arguably merit the grant of a new trial and reversal of defendant's conviction and/or sentence are thoroughly treated above. Accordingly, this assignment of error is without merit.

CAPITAL SENTENCE REVIEW

Under La.C.Cr.P. art. 905.9 and La.S.Ct.R. 28, this court reviews every sentence of death imposed by the courts of this state to determine if it is constitutionally excessive. In making this determination, the court considers whether the jury imposed the sentence under influence

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(same); *State v. Savoie,* 448 So.2d 129, 135 (La.App. 1 Cir.1984) (same), *writ denied,* 449 So.2d 1345 (La.1984).

of passion, prejudice or other arbitrary factors; whether the evidence supports the jury's findings with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender. In the instant case, the district judge has not submitted a Uniform Capital Sentence Report (USCR) but the Department of Corrections has submitted a Capital Sentence Investigation Report (CSIR). In addition, the State and the defendant each filed a Sentence Review Memorandum.

The CSIR indicates that defendant is a black male born on March, 21, 1962. He was thirty-four years old at the time of the offense. He was born in Catahoula Parish. His mother and father had a common-law marriage. Defendant, the youngest of seven brothers and sisters, was five years old when his parents split up in 1967. His mother never remarried and he had no real father. Apparently, defendant's sisters took on most of the child rearing responsibilities. However, according to the CSIR, the defendant became closer to his father later in life. Defendant was a "C" student in school, but got "A's" in math. He completed the 12th grade and joined the Marine Corps. He served four years active duty and two years inactive duty and was honorably discharged. Defendant worked for Conti Fleeting for four years as a welder/fitter. He also worked as a truck driver and did waterproofing. He held a job as a security guard for Capitol Protective in 1985 and 1986. CSIR, p. 5.

Defendant and Mary Snyder were married for eight years. They have three children. Quinan, age 11; Allen, Jr., age 9; and Jordan, age 7. According to the CSIR he claims that his wife is drinking and using drugs and believes that he would be a danger to her if he is released. He claims

that people have lied to her, telling her that he will be eligible for parole in ten years. CSIR, p. 5.

The CSIR also indicates that the defendant is in fair health. Since being in jail, defendant has developed prostatitis and is having problems with his legs. CSIR, p. 5. Defendant admits to using cocaine in 1989 and also admits the use of marijuana. He successfully completed a substance abuse program several years ago and has been opposed to drugs ever since. CSIR, p. 6.

The defendant has received psychiatric treatment in jail. First, court appointed doctors conducted a competency exam in August of 1996. They found that defendant could understand the proceedings against him and was able to assist in his own defense. According to the CSIR, defendant informed the examining physician that he felt as though his mother emotionally and physically abused him, and claimed that both of his parents drank a lot. He also told doctors of his wife's history of promiscuity noting that she had a five month old child before their marriage and was pregnant by him at the time they married. He recalled that he would not marry his wife until after the child was born for fear that it was not his. CSIR, p. 6. Defendant also indicated to the doctors that he had never abused drugs or alcohol but that he did drink large amounts of beer after work during 1986 and 1987, and suffered from black outs. Doctors diagnosed defendant with depression and prescribed Sinequan, which defendant took through most of his incarceration. The CSIR notes that defendant's depressive disorder is likely secondary to the stress of incarceration and anxiety regarding his situation. CSIR, p. 6.

The Department of Corrections contacted members of the defendant's family to obtain a more complete record of

defendant's social history. They spoke with Murray Smith, a friend of the defendant, who indicated that he had known him all of his life. He stated that defendant, "is a very nice guy . . . [and they'd] done a lot of things together in their time." CSIR, p. 6. He also informed the interviewer that defendant does not do drugs anymore, that he had been "clean and straight" for twelve years. He also indicated that he knows defendant's wife well and thinks that defendant's case was poorly handled. CSIR, p. 6. The interviewer also spoke with Winnie Walker, defendant's mother. She stated that since defendant had been in jail, his wife sold all of his clothes and that a man named "Ralph" moved into his house. She claimed that the defendant's children are with her all the time because they do not want to return to their mother. She believes that the children are intelligent and know what is going on. Additionally, she does not believe defendant received a fair trial on March 26, 1999. CSIR, p. 6.

The CSIR shows that defendant had no juvenile record but received five years probation for distribution of cocaine on September 27, 1989. Defendant successfully completed his probation and attended a drug abuse clinic. CSIR, p. 5.

In the instant case, the state presented only one aggravating circumstance, that defendant knowingly created a risk of death or great bodily harm to more than one person. The jury agreed. La.C.Cr.P. art. 905.4. The defense presented seven witnesses during the penalty phase.

Passion, Prejudice, and other Arbitrary Factors

The defendant contends that three elements injected passion, prejudice, arbitrariness, and caprice into the proceedings: (1) his defense attorneys failed to present evidence of his "mental defect" during the guilty phase of the trial, thus making the evidence of his depressed state during the crime seem like a last ditch effort to save his life during the penalty phase of the trial; (2) the trial court improperly admitted highly prejudicial photographs; and (3) the district attorney impermissibly appealed to prejudice during his closing arguments by referring to the O.J. Simpson case. All of these factors were discussed in depth above in the individual assignments of error and are without merit. An independent review of the record does not provide any other indication of passion, prejudice or any other arbitrary factors.

Aggravating Circumstances

At trial, the State argued that one aggravating circumstances [sic] existed: the offender knowingly created a risk of death or great bodily harm to more than one person. The jury found the existence of this circumstance.

As previously discussed in defendant's claim of insufficient evidence, the evidence presented by the State was sufficient to sustain the finding of all of the elements of first degree murder. The evidence also demonstrated that the defendant knowingly created a risk of death or great bodily harm to more than one person, the victim, Howard Wilson, and the defendant's estranged wife, Mary Snyder. La.C.Cr.P. art. 905.4(A)(4). Consequently, the defendant's sentence of death is firmly grounded on the finding of this aggravating circumstance.

Proportionality

Although the federal Constitution does not require a proportionality review, *Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Burrell,* 561 So.2d 692, 710 (La.1990). This court, however, has vacated only one capital sentence on the ground that it was disproportionate to the offense and the circumstances of the offender, *State v. Sonnier,* 380 So.2d 1, 7 (La.1979), although it effectively decapitalized another death penalty reversal on other grounds. *See State v. Weiland,* 505 So.2d 702 (La.1987) (on remand, the state reduced the charge to second degree murder and the jury returned a verdict of manslaughter).

This court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. *Sonnier, supra.*

The State's Sentence Review Memorandum reveals that since 1976, jurors in the 24th Judicial District, have returned a guilty verdict for a first degree murder charge in 65 cases, including the defendant's case, and recommended imposition of the death penalty 18 times, including the current case. Ten[23] of the 18 cases in which the jury

[23] Two other cases referred to in the State's Capital Sentencing Memorandum have not yet reached this court. Consequently, whether

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returned a death sentence involved as an aggravating factor the risk of death or great bodily harm to more than one person. The first of the ten cases is that of Benjamin Berry, who fatally shot a law enforcement officer during a bank robbery. Berry was executed in 1987. *State v. Berry,* 391 So.2d 406 (La.1980); *cert. denied,* 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981). The second case is that of Tyronne Lindsey, who killed a shopper in the Oakwood Mall parking lot. After numerous resentencings and a retrial, Lindsey was once again sentenced to death. *State v. Lindsey,* 543 So.2d 886 (La.1989); *cert denied,* 494 U.S. 1074, 110 S.Ct. 1796, 108 L.Ed.2d 798 (1990). The third case is that of Jimmy Robinson, who killed the husband of an apartment complex manager in her presence during an armed robbery. This Court affirmed the conviction but vacated the death sentence and, on remand, Robinson received a life sentence. *State v. Robinson,* 421 So.2d 229 (La.1982). The fourth case is that of Leslie Lowenfield who shot and killed his ex-girlfriend, her daughter, parents and current boyfriend. This court affirmed the conviction and sentence. *State v. Lowenfield,* 495 So.2d 1245 (La.1985), cert. denied *Lowenfield v. Louisiana,* 476 U.S. 1153, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986). The fifth case is that of Glen Keith Weiland, who stabbed his girlfriend and her

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or not the jury found the aggravating factor of risk of death or bodily harm to more than one person is unknown at this time. The cases are as follows:

Elzie Ball shot and killed a delivery man who attempted to stop the armed robbery of a bar owner and employee in progress when he entered the establishment. *State v. Ball,* Docket No. 96-4222, Division "C".

Lawrence Jacobs murdered victim and his mother during the course of an aggravated burglary. *State v. Jacobs,* Docket No. 96-7161, Division "H".

ex-husband, killing the female victim. This court reversed Weiland's first degree murder conviction. *State v. Weiland,* 505 So.2d 702 (La.1987). On retrial the state amended the indictment to second degree murder. The jury subsequently convicted defendant of manslaughter and he was sentenced to 21 years imprisonment at hard labor. The sixth case is that of Robert Tassin, who shot two victims in the course of an armed robbery/drug deal, one fatally. The court affirmed his conviction and sentence. *State v. Tassin,* 536 So.2d 402 (La.1988). The seventh case is that of Manuel Ortiz, a murder-for-hire case in which the defendant employed a "hitman" to kill his wife and her friend. This Court affirmed defendant's conviction and sentence. *State v. Ortiz,* 96-1609 (La.10/21/97), 701 So.2d 922. The eighth case is that of Julius Lucky, who shot two of his coworkers, one fatally, during the course of an armed robbery. *State v. Lucky,* 96-1687 (appeal pending before this Court). The ninth case is that of Edward Harris, who shot and killed two pedestrians in a drive-by shooting. *State v. Harris,* (appeal not yet filed before this court). Last is the case of Damon Thibodeaux who kidnapped, raped and killed Crystal Champagne, a fourteen-year-old girl. *State v. Thibodeaux,* 98-1673 (appeal pending before this court).

The brief outline of the cases above provides strong support for an argument that the death penalty imposed in this case is not disproportionate. In the event that the court decides to resort to use of a statewide basis of comparison, the defendant would be unlikely to fare any better. Cases are legion in which this court has affirmed capital sentences based primarily on the jury's finding that the defendant created the risk of death or great bodily harm to more than one person. *State v. Baldwin,* 96-1660 (La.12/12/97), 705 So.2d 1076 (affirming death penalty

based on aggravating factor that defendant created a risk of death or great bodily harm to more than one victim where the defendant shot and killed his estranged wife and the three men with her at the time); *State v. Tart,* 93-0772 (La.2/9/96), 672 So.2d 116 (affirming death penalty where jury found aggravating circumstance that defendant knowingly creating risk of death or great bodily harm to more than one person where defendant murdered his estranged girlfriend and severely wounded her mother); *State v. Sanders,* 93-0001 (La.11/30/94), 648 So.2d 1272 (Defendant killed estranged wife and her new boyfriend, affirmed death penalty based on aggravating factor that defendant created a risk of death or great bodily harm to more than one victim).

DECREE

The conviction and sentence of death are conditionally affirmed on the evidence in the record on appeal. However, a final determination of the appeal is pretermitted, and the case is remanded to the district court for a determination of whether a meaningful inquiry into defendant's competence at the time of trial is now possible and, if so, for an evidentiary hearing and determination on this issue. Defendant's right to appeal from an adverse decision is reserved.

LEMMON, J., concurs in remanding the case to the district court for a reopened hearing on competency to proceed, but otherwise dissents from affirming the conviction and sentence, and assigns reasons.

VICTORY and TRAYLOR, JJ., concur in affirming the defendants conviction and sentence but dissent from the remand.

JOHNSON, J., dissents and assigns reasons. LEMMON, J., concurring in part and dissenting in part.

The racial bias overtones of the entirety of this rather simple trial require reversal of the conviction and sentence of a black defendant tried by an all-white jury.

Early in the voir dire, the prosecutor accepted a black juror (Brooks). When two other black jurors were peremptorily struck, defense counsel noted their race, but did not attempt to establish a prima facie case of discrimination necessary to make a *Batson* challenge, apparently because one black juror had already been accepted. However, the prosecutor, after peremptorily striking a third black juror, also backstruck Brooks. When required by the judge to give a race-neutral explanation for striking Brooks, the prosecutor stated what essentially was no reason at all, asserting that the juror would miss class as a student teacher and may try to hurry the trial. However, on the previous day when Brooks was accepted, the dean of the school told the judge's clerk that Brooks' missing class would not be a problem, and the prosecutor apparently did not think it would be a problem, since he initially accepted Brooks. The backstriking of Brooks, along with the peremptory challenging of all four of the other blacks on the jury venire, resulted in an all-white jury, and the timing of the Brooks backstrike made the early acceptance of Brooks suspect.

Whether the conviction and sentence should be reversed on the *Batson* issue is a very serious issue. However, the prosecutor's intention to utilize racial bias

became crystal clear when he commented during closing argument in the penalty phase that O.J. Simpson "got away with it" in the California verdict that had been rendered shortly before this trial.

Prior to trial, the defense moved to exclude any reference to the Simpson verdict, arguing that this prosecutor "has been all over two parishes talking about 'this is his O.J. Simpson case'" and that any reference to the Simpson verdict, overwhelmingly unpopular in national polls of white citizens, would be extremely prejudicial. The prosecutor did not attempt to explain the relevance of any reference to the Simpson verdict, but gave "my word" that "I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case." The judge stated that, "[b]ased on [the prosecutor's] representations, I'm going to deny your motion."

The prosecutor did not mention the Simpson verdict until closing argument in the penalty phase when he, in effect, urged the all-white jury not to let this O.J. prototype "[get] away with it." The acquittal of Simpson, a high profile black defendant who had threatened to kill himself before his arrest, was totally irrelevant to any issue in the penalty phase of the present case.[24] The prosecutor's attempt to inflame the jury by characterizing Simpson's

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[24] The penalty phase of a *capital* case focuses primarily on "the circumstances of the offense and the character and propensities of the offender." The Simpson trial, of course, was not a *capital* case. Therefore, the prosecutor's plea in the *penalty phase* of this case not to let another murderer "[get] away with it" not only was irrelevant to any penalty phase issue, but was an inaccurate comparison since the murderer in this case was already facing a life sentence as a result of the already rendered verdict in the guilt phase.

acquittal as "he got away with it" was highly prejudicial to this black defendant.

I find compelling the rhetorical question by defense counsel in oral argument before this court, asking whether the prosecutor would have ranted about O.J.'s getting away with it if he had not backstruck the only black juror toward the end of voir dire.[25] Racially inflammatory tactics, such as those in the present case, should not be tolerated, even at the expense of the reversal of convictions and sentences obtained by their use. This is the only means this court has to halt similar tactics in the future, perhaps in the guilt phase of the trial of an innocent person.

The senseless carnage by this defendant does not make this a very sympathetic case for the defense. Nevertheless, this defendant is constitutionally entitled to a fair trial that is as free as possible of any aura of racial bias. He did not receive such a trial in this case.

VICTORY, J., concurring in part and dissenting in part.

I agree with all other aspects of the majority opinion, but I dissent from that part of the opinion which finds the trial court erred in failing to investigate defendant's request for a continuance based upon a claim of incompetence and remands the case for a hearing to determine whether a retrospective determination of defendant's

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[25] Of course, the vote of only one juror would mandate defendant's being sentenced to life imprisonment.

competence is possible. I would unconditionally affirm defendant's conviction and sentence.

I note the following from the record:

(1) Defense counsel's motion for a sanity commission in late July, 1996, about a month before trial, contains substantially the same complaints of mental incapacity to proceed as the motion for continuance filed in mid-August, 1996.

(2) A full sanity hearing was held on August 8, 1996. According to Drs. DePrato and McDermott's report:

> [Sinequan] had been effective in abating his depression. However, as his trial date approaches, Mr. Snyder's anxiety has escalated. As a consequence of his symptoms, he occasionally has difficulty focusing on questions asked of him and becomes mildly circumstantial and tangential. He is able to be re-directed and can focus his attention when he is provided structure. The results of this evaluation do not provide evidence of cognitive disturbances. He exhibited symptoms consistent with a depressive disorder which is likely secondary to the stress of incarceration and anxiety regarding his current situation. Such symptoms do not interfere with his ability to understand the proceedings against him or to assist in his defense. It is our opinion that Mr. Snyder may benefit from a change in medications. It appears that Sinquan has been maintenanced at a low dose secondary to side effects and may worsen his prostatitis. It is possible that he may benefit from an antidepressant such as Prozac or Zoloft, which can be increased to a level to better control his depressive symptoms. Consequently, it is our opinion, at the time of the

> evaluation, Mr. Snyder is able to understand the proceedings against him and is able to assist in his defense.

(3) Defendant's medication was changed to Prozac on August 16, 1996. There is *no evidence* that the change to Prozac made defendant's depression *worse*. In fact, Dr. DePrato testified at the sanity hearing that " . . . some people begin to respond immediately while the full maximum potential can take about six weeks." By the time of defendant's trial, he had been on Prozac for almost two weeks.

(4) At the hearing on defendant's motion for continuance held on August 20, 1996, defendant again did not call his treating physician, Dr. Richoux, as a witness, but proffered his letter dated August 16, 1996, noting the change in medication three days earlier and stating that " . . . Snyder continues to display severe depressive symptoms that *may* interfere with his ability to assist his attorney. . . ." Yet, Drs. DePrato and McDermott used Dr. Richoux's records of treatment of defendant at JPCC in their evaluation of defendant in their report to the court on August 2, 1996.

Viewed in a light most favorable to defendant, all the hearsay letter possibly shows is that Dr. Richoux *may* have considered defendant's condition to be worse than Drs. DePrato and McDermott did *before* the change in medication, and that, in his opinion, the depression *may* interfere with his ability to assist his attorney. There is no suggestion that Dr. Richoux has ever evaluated defendant's competency to stand trial under the *Bennett* factors, as did Drs. DePrato and McDermott in their exhaustive report to the trial court dated August 2, 1996. Further, it is obvious that Dr. Richoux changed defendant's medication at the

suggestion of Drs. DePrato and McDermott, who felt that defendant *might* benefit from Prozac, although Sinequan prescribed by Dr. Richoux had already been effective in abating his depression.

(5) Defense counsel acknowledged that defendant was not incompetent to proceed.

The majority states that "[i]n contrast to the *Lopez* case, the trial court in this case did not undertake any investigation into the allegations made by defense counsel that defendant was having difficulties communicating with her." Maj. Op. at 853. Of course, this is not accurate. These allegations were made by defense counsel in the motion for a sanity commission and the trial court received extensive evidence on the subject at the August 8, 1996 sanity hearing from the testimony of Dr. DePrato and the report presented by Drs. DePrato and McDermott. These doctors discussed the *Bennett* factors at length in their written report and concluded that although the defendant "*occasionally* has difficulty focusing on questions asked of him and becomes *mildly* circumstantial and tangential . . . such *symptoms do not interfere with his ability to understand the proceedings against him or to assist in his defense.*"

Defendant had every opportunity to present evidence of his incompetency at the sanity hearing he provoked, but chose not to present any witnesses. The evidence presented by the State at that hearing very strongly proves defendant had the ability to proceed with trial. Merely because on recommendation of the very doctors who found him competent to proceed, his medication was changed to make him *even more competent* to proceed, does not suggest that his competency was or is in question. The trial

court allowed defense counsel to testify as to "anything new" of a non-confidential nature that showed defendant was not able to assist her. Instead, she simply continued to reiterate that defendant wanted six weeks to receive the full benefit of the new medication, a fact presented to the trial judge by Dr. DePrato on August 8, 1996 at the sanity hearing *before* he ruled that defendant had the capacity to proceed.

TRAYLOR, concurs in part and dissents in part for reasons assigned by VICTORY, J.

JOHNSON, J., Dissenting.

I would have more confidence in the fairmindedness of this jury and the jury's pronouncement of the death sentence, had the state not used its peremptory challenges to exclude every African American juror, resulting in an all white jury for this black defendant. In my view, this violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed.2d 69 (1986), coupled with the prosecutor's inflammatory and prejudicial comparison of this case to the O.J. Simpson trial, require that we set aside the death sentence and remand the case for resentencing.

The Sixth Amendment to the United States Constitution gives a criminal defendant the right to a trial by a jury of his peers. I still believe that racial discrimination in the jury selection process offends the Equal Protection Clause of the Fourteenth Amendment and a pattern of strikes against African American jurors still gives rise to an inference of discrimination. Once the inference of discrimination is present, the prosecutor then has the burden of articulating a race-neutral explanation for

striking the African American jurors. The trial judge serves as the gatekeeper, ensuring that racial prejudice, which impedes the securing of equal justice, does not invade our judicial system. As the gatekeeper, the trial judge must decide whether the prosecutor has articulated a genuine concern, or whether the reason articulated is merely a guise to accomplish his/her discriminatory purpose. Verbalized facially neutral reasons can be a pretext for conscious or unconscious racism.

In the present case, the prosecutor's action in accepting the first African-American juror seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions. Nonetheless, defense counsel noted in the record which excluded jurors were African-American. The *Batson* challenges to the remaining three African-American jurors, including the one juror who was accepted and later backstruck, were overruled by the trial court. The trial court accepted the prosecutor's "race-neutral" explanations and the majority found them to be "plausible, supported by the record and race neutral."

The prosecutor's discriminatory intent in excluding all African-Americans from the jury was evidenced by his reference to the O.J. Simpson trial during closing arguments. In *State v. Green,* 94-0887 (La.5/22/95), 655 So.2d 272, 287, we recognized that "for a *Batson* challenge to succeed, it is not enough that a racially discriminatory result be evidenced; rather, that result 'must ultimately be traced to a racially discriminatory purpose.'" Here we have a racially discriminatory result. An all-white jury selected by peremptorily excluding the five African-Americans from the venire, and the prosecutor's racially discriminatory purpose of inflaming the jury by referring to O.J. Simpson getting away with murder in California.

Because of the nationwide media focus on O.J. Simpson, the defense made a pre-trial motion to exclude any references to the O.J. Simpson case. This motion was denied by the trial judge based on the prosecutor's assurance that he would not, at any time during the course of taking evidence or before the jury, mention the O.J. Simpson case.[1] It

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[1] During the hearing on the pre-trial motion to exclude references to the O.J. Simpson case, the following colloquy occurred:

Prosecutor:

Now, certainly, I can assure the Court that I'm not going to get up in my opening voir dire and say, "we're here for the Jefferson Parish O.J. Simpson court-case." I have no intentions of doing that. I have no – perhaps in argument, I don't know. I don't know. It might be inappropriate, but I think it's premature. And I can assure this Court I will make no reference to the O.J. Simpson case at any time during the course of the taking of any evidence in this case.

Defense Attorney:

That's – Judge, evidence is not what I'm worried about. I'm certain he's not going to ask any witnesses, "don't you think this is a whole lot like the O.J. Simpson case?" I'm concerned about Mr. Williams' famous arguments.

. . . .

Defense Attorney:

And I would ask that the court issue a ruling that Mr. Williams is not to refer to this or to make comparisons in any way with the O.J. Simpson case and that he be held in contempt if he does that.

Prosecutor:

Judge, I ask the court to allow me, as an officer of this Court, to conduct this case in the proper manner, but in the way that I see fit. And, I have given the Court my word that I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case. . . . So, I have – I give the Court my word that I won't do this. I just ask you not to grant this motion.

. . . .

The Court:

(Continued on following page)

is blatantly clear that the prosecutor did not intend to keep his word. The prosecutor had no need to make reference to this defendant not getting away with murder during the penalty phase of the trial. At this point, the defendant had already been convicted of the crime, so there was nothing for him to "get away with." The prosecutor utilized the O.J. Simpson verdict to racially inflame the jury's passion to sentence this defendant to death. Such tactics leave no doubt in my mind that the prosecutor had a racially discriminatory purpose for excluding the African-American jurors.

The defense argues that the prosecutor's comments on the O.J. Simpson verdict to this all white jury were devastating and requires that the conviction be reversed. While there is much evidence that the majority of white Americans believe O.J. Simpson was guilty of murdering his wife and that he "got away with it," the prosecutor's improper comments during the penalty phase do not implicate the trial phase. The defendant's own confession, plus the testimony of his ex-wife, Mary Snyder who survived this brutal attack, along with that of Gwen Williams, the witness who came to the aid of Ms. Snyder during the attack, support the defendant's conviction of first degree murder. The prosecutor's improper and clearly inflammatory comments did, however, create a substantial risk that the death penalty would be imposed. In my opinion, the defendant's death sentence should be set aside and this matter remanded for resentencing.

For the aforementioned reasons, I respectfully dissent.

Based on Mr. Williams' representations, I'm going to deny your motion.

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874 So.2d 739

SUPREME COURT OF LOUISIANA

No. 98-KA-1078

STATE OF LOUISIANA

v.

ALLEN SNYDER

April 14, 2004.
Rehearing Denied June 25, 2004.

Marion B. Farmer, Covington, Jerry L. Fontenot, Mandeville, for applicant.

Charles C. Foti, Jr., Attorney General, Paul D. Connik, Jr., District Attorney, Terry M. Boudreaux, Gretna, Alfred A. Olinde, Jr., James A. Williams, for respondent.

VICTORY J.*

The defendant in this case, Allen Snyder, is before this Court on direct appeal for a second time from his conviction for first-degree murder and sentence of death. Having conditionally affirmed the defendant's conviction upon his first appeal to this Court (*See State v. Snyder*, 98-1078 (La.4/14/99), 750 So.2d 832), we remanded this case to the district court to determine (1) whether the defendant's competency to stand trial can be adequately examined retrospectively, and, if so (2) whether the defendant was competent to stand trial. The district court, after a hearing on these issues, determined that a retrospective determination of competency was possible in this case and that the defendant was, in fact, competent to stand trial. We now affirm these rulings.

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* Retired Judge Melvin A. Shortess, assigned as Associate Justice Ad Hoc., sitting for Associate Justice Jeanette T. Knoll, recused.

FACTS AND PROCEDURAL HISTORY

On August 29, 1996, a jury convicted the defendant, Allen Snyder, of the first-degree murder of Howard Wilson. After the penalty phase of a bifurcated trial, the jury unanimously determined that the defendant should receive the death penalty, and he was sentenced accordingly by the trial judge. The incident for which Snyder was convicted arose in August of 1995, when he attacked Mary Snyder, his estranged wife, and her companion Howard Wilson. During the attack, the defendant killed Mr. Wilson by inflicting nine knife wounds, and seriously injured Mary, stabbing her a total of nineteen times.[1]

The defendant was arrested by the police without incident and was subsequently incarcerated at the Jefferson Parish Correctional Center. After the defendant's arrest, but before his trial, Snyder began showing signs of severe depression. Dr. Richoux, a psychiatrist working with the correctional facility, began treating the defendant for depression, and the defense counsel moved for a sanity commission to be appointed to examine the defendant's competency to stand trial.

On August 1, 1996, the defendant's competency was examined by a sanity commission composed of Dr. Debra DePrato and Dr. Barbara McDermott. During their examination of the defendant, the doctors performed the standard tests used to determine legal competency, or competency to stand trial (*See State v. Bennett,* 345 So.2d 1129, 1138 (La.1977) (on rehearing)). Seven days later,

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[1] The nature and specifics of the crime for which Snyder was convicted are discussed in *State v. Snyder* 98-1078 (La.4/14/99), 750 So.2d 832.

when the sanity hearing was held, both examining doctors submitted a report stating that Snyder was legally competent to stand trial. After considering the report of the two doctors, and the testimony of Dr. DePrato, the trial judge determined Snyder to be legally competent. During the course of the competency hearing, Dr. DePrato testified that in her expert opinion the defendant was "able to assist in his own defense as well as understand the proceedings against him." However, she went on to say that the defendant had difficulty focusing on certain issues and "became mildly circumstantial and tangential." *Snyder,* 750 So.2d at 847.[2] In accordance with her opinion that the defendant exhibited a deficiency in his ability to concentrate, Dr. DePrato recommended that the defendant's antidepressant medication be changed from Sinequan to Prozac, which would allow an increased dosage of medication to be given to the defendant without the side-effects. [3]

Dr. Richoux, who was then Snyder's treating physician, agreed with this recommendation, and the defendant's medication was changed to Prozac on August 16, 1996. The defense counsel then moved for a five-week continuance in order to allow the new medication enough

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[2] For a transcript of the relevant testimony from the sanity hearing, refer to *State v. Snyder* 750 So.2d at 848.

[3] When questioned about the defendant's medication, Dr. DePrato advised that due to the side effects caused by Sinequan, including urinary retention and constipation, he was given a low dosage; and while this dosage had helped the defendant's symptoms of depression, it did not totally alleviate these problems. Additionally, her testimony revealed that because of the side effects, he wasn't taking Sinequan consistently enough to be fully effective.

time to take full effect.[4] A hearing on this motion was conducted on August 20, 1996, in which the defense counsel stated that although the defendant was technically competent, a five-week continuance was being requested to allow the defendant to have "every bit of [counsel's] assistance, which [counsel] cannot render adequately at this time." Despite a letter from the defendant's attending psychiatrist, Dr. Richoux, which indicated that his inability to focus could interfere with his ability to assist his attorney without waiting six weeks, the court denied the motion for a continuance and did not order any further inquiry regarding this issue.

Following the trial court's denial of the defendant's motion for continuance, the defendant saw two more clinical psychologists. Dr. Thomas Hannie, Jr. examined the defendant on August 21, 1996, one week after his change in medication, and found the defendant to be well oriented and his speech to be clear and well organized. He also noted that the defendant's concentration was excellent, and that he was able to correct the doctor's notes from across the desk and by reading upside down. The second such examination was done by Dr. Elaine Salzer on August 22, 1996. She gave the opinion that the defendant had not yet stabilized on his medication, and while he does not "reflect a psychotic process or formal thought disorder, . . . at times, this individual's thinking is slow and he can become easily confused."

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[4] The testimony of expert witnesses suggests that, although Prozac can take effect in as little time as a week from when it is started, it takes six weeks for the medication to reach its maximum effect.

After these evaluations, the trial counsel for the defendant requested that she be allowed to present *in camera* testimony to the court to explain her difficulties communicating with the defendant. Although the trial court denied this request, defense counsel was permitted to testify in open court regarding her problems communicating with defendant and relating that her representation of the defendant had been compromised by the defendant's depression and inadequate treatment.

Based on this evidence, this Court determined that the trial judge erred when he failed to further inquire into the defendant's capacity to proceed with trial. Accordingly, we conditionally affirmed the defendant's conviction and sentence, but remanded the case to the district court for a retrospective determination of competency, if one could be made.[5]

Pursuant to this Court's order and upon remand, the trial court held a bipartite hearing to determine if a *nunc pro tunc* ruling could be made regarding the defendant's competency at the time of trial, and if the defendant was competent to proceed with trial. After hearing testimony of witnesses and reviewing the evidence, the district court ruled that a retrospective determination of the defendant's competence was possible and that the defendant was, in fact, competent at the time of trial. It is from these rulings that the defendant appeals.

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[5] *Id.* at 863.

DISCUSSION

It has long been established that a person whose mental condition is such that he lacks the capacity to understand the nature of the proceedings against him, and is unable to assist counsel, may not be subject to trial. *Drope v. Missouri,* 420 U.S. 162, 171, 95 S.Ct. 896, 903, 43 L.Ed.2d 103 (1975). Thus, in order to proceed with trial, a defendant must be "legally competent." *Medina v. California,* 505 U.S. 437, 449, 112 S.Ct. 2572, 2579, 120 L.Ed.2d 353, 365-66 (1992). Louisiana's statutory scheme for detecting mental incapacity "jealously guards a defendant's right to a fair trial." *State v. Nomey,* 92-1631 (La.1/19/93) 613 So.2d 157, 161. (quoting *State v. Rogers,* 419 So.2d 840, 843 (La.1982)).

In evaluating the legal capacity of the criminally accused, we have stated that the considerations in determining whether the defendant is fully aware of the nature of the proceedings include:

> whether he understands the nature of the charge and can appreciate its seriousness; whether he understands what defenses are available; whether he can distinguish a guilty plea from a not guilty plea and understand the consequences of each; whether he has an awareness of his legal rights; and whether he understands the range of possible verdicts and the consequences of conviction. *State v. Bennett*, 345 So.2d at 1138.

More specifically to this case, we have stated that the facts to consider in determining the defendant's ability to assist in his defense include:

> whether he is able to recall and relate facts pertaining to his actions and whereabouts at certain

> times; whether he is able to assist counsel in locating and examining relevant witnesses; whether he is able to maintain a consistent defense; whether he is able to listen to the testimony of witnesses and inform his lawyer of any distortions or misstatements; whether he has the ability to make simple decisions in response to well-explained alternatives; whether, if necessary to defense strategy, he is capable of testifying in his own defense; and to what extent, if any, his mental condition is apt to deteriorate under the stress of trial. *Id.* at 1138.

As such, a court has a duty to order further inquiry into the competence of an individual any time such competency is called into question. *Drope,* 420 U.S. at 173, 95 S.Ct. at 904. In Louisiana, "[m]ental incapacity to proceed exists when, as a result of mental disease or defect, a defendant **presently** [emphasis added] lacks the capacity to understand the proceedings against him or to assist in his defense." La.C.Cr.P. art. 641; see also *Nomey,* 613 So.2d at 161. This language suggests that the defendant's capacity may need to be reevaluated if there is a significant change in the defendant's psychiatric condition between the sanity hearing and trial.

In the defendant's previous appeal to this Court, we decided that the arguments presented by defense counsel "raised the issue of whether defendant could communicate with counsel well enough to allow her to effectively assist him." *State v. Snyder,* 98-1078 (La.4/14/99), 750 So.2d 832, 851. Although the defense counsel stated that the defendant was "technically competent," and that the continuance was requested simply to allow better communication between Snyder and his attorneys, we found that by asking for a continuance, the motion actually was directed

to Snyder's competence.[6] Further, we stated that it was doubtful that this due process right could be waived by any actions of the incompetent party. *Id.* at 852. We held, then, that although a sanity commission had already been appointed to examine the defendant, the purported effects of a change in the defendant's medication and the testimony presented subsequent to the sanity hearing gave the trial judge sufficient reason to order further inquiry into the defendant's ability to communicate with counsel.[7] Thus, it was the "trial court's absolute failure to investigate these claims [of legal incapacity], which were substantiated by objective medical evidence, that cause[d] us to determine he abused his discretion in failing to investigate defense claims of incompetence." *Id.* at 852.

Subject to our remand, the trial court conducted a bipartite hearing, in which three witnesses testified as to Snyder's competency as of the date of the trial. On December 16, 1999, two of the defendant's attorneys testified concerning the difficulty they had in communicating with the defendant prior to the trial. Mr. Cesar Vasquez, who was appointed as Snyder's counsel during the penalty phase of his trial, testified that he "met with him on approximately three or four occasions over at the Correctional Center, when I would attempt to interview him or speak to him regarding the preparation of his penalty

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[6] La.C.Cr.P. art. 642 allows "the defendant's mental capacity to proceed [to] be raised at any time by the defense, the district attorney, ***or the court***" [emphasis added].

[7] In *Snyder*, we stated that "[defense counsel's] difficulty in communicating with the defendant . . . coupled with the medical evidence presented, while not necessarily dispositive of the issue, were nevertheless sufficient to warrant the trial court's attention." 750 So.2d at 851.

phase" and that during these interviews he "had an almost impossible task of communicating with him, he would break down and cry within . . . five minutes of sitting down and talking to him." Thus, he urged that Snyder was not legally competent to proceed with trial as he was not able to assist counsel in the preparation of his own defense.

Additionally, the defendant's guilt phase lawyer, Graham daPonte, testified at the hearing that she had an extremely difficult time communicating with Snyder. When consulting with him, Ms. daPonte found the defendant to be "agitated and difficult to talk to . . . , difficult to work with" and "very circuitous and circular in his dealings with me." She additionally stated that although the defendant had expressed the desire to testify in his own defense, she didn't feel that Snyder "could maintain a clear train of thought" and therefore she "was not going to let him testify."

The last witness was presented by the state on September 7, 2000, after a continuance had been granted by the trial judge. Dr. Richard Richoux, a board certified psychiatrist with a sub-specialty in forensic psychiatry, testified that after treating Snyder over a period of about a year and nine months,[8] including the period of time immediately prior to trial, it was consistently his opinion that the defendant was suffering from depression. It was Dr. Richoux's opinion that Snyder's depression appeared:

> to be of a reactive nature; meaning that people that are incarcerated and have very serious criminal charges facing them frequently manifest

[8] Dr. Richoux had seen the defendant approximately 21 times during this time period.

> a certain amount of depression which I think makes sense from simply a common sense standpoint.

Addressing the first issue, as to whether the defendant's competency could be examined retrospectively, the doctor explained that:

> when one looks at a situation retrospectively, the first question one asks is; based on the data available . . . was a mental defect present at that point in time that was of a certain degree of severity.

Dr. Richoux stated that he was "able to look back at [his] treatment of this individual at the point in question and give an opinion about the severity of any psychiatric impairments that he was showing at that time." Thus, he believed that the detailed treatment records that were kept regarding Snyder's treatment, enabled him to give an informed opinion regarding the defendant's past psychiatric condition.

Although Dr. Richoux admitted that during his treatment of the defendant he did not evaluate the defendant's legal competency under the *Bennett* criteria,[9] he testified that he understood and was experienced in giving such an evaluation. 345 So.2d 1129 (La.1977).[10] He described the test for legal competency as determining:

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[9] The factors to be considered in determining legal competency are explained *supra* p. 742 in this opinion.

[10] At the time of the hearing, Dr. Richoux had been involved in over 5,000 sanity commissions in which the *Bennett* factors were used to evaluate the competency of an accused to stand trial.

> whether an individual suffers from a mental disease or defect . . . which is sufficiently severe to render them unable to understand legal proceedings and/or unable to assist counsel in their defense.

Thus, Dr. Richoux felt certain that he was:

> able to give an opinion about what [Snyder] was experiencing psychiatrically in terms of any specific psychiatric diagnosis or impairment and what, based on that, my expectation would be as to his ability to meet the *Bennett* criteria. *Id.*

After testifying as to the possibility of a retrospective determination of competence, Dr. Richoux articulated the substance of his findings. In doing so, he explained that the primary issue in determining competency involves the determination of:

> whether that individual is suffering from a relatively severe mental disease or defect of some sort at a given point in time. If the mental disease or defect, should there be one present, is not of a certain degree of severity, then it's highly unlikely that whatever that mental disease or defect is going to render the individual unable to understand the proceedings and/or unable to assist counsel in that person's defense."

After careful analysis of his treatment, Dr. Richoux testified that it was never his opinion that Snyder's "depression rose to the level of affecting his comprehension so severely that he would be unable to assist counsel with a trial." Thus, in Dr. Richoux's opinion, Snyder was legally competent at the time of trial.

In addition to the testimony by Dr. Richoux, the trial court also consulted the pre-trial testimony of Dr. DePrato,

from the defendant's competency hearing, along with the report she submitted with Dr. McDermott. Likewise, the court took into consideration the letter submitted by Dr. Hannie, and a separate psychological evaluation by Dr. Salzer.[11] In total, the district court assessed the evaluations of five psychiatrists/psychologists who had all met with the defendant prior to trial.

Although conflicting testimony was presented to the trial court concerning Snyder's legal competency at the time of trial, there is a legal presumption that a defendant is sane and competent to proceed. La. R.S. 15:432; *State v. Bridgewater,* 00-1529, p. 6 (La.1/15/02), 823 So.2d 877, 888; *State v. Martin,* 00-0489 (La.9/22/00) 769 So.2d 1168, 1169. Accordingly, the defendant has the burden of proving by a preponderance of the evidence his incapacity to stand trial. *State v. Frank,* 96-1136 (La.10/4/96), 679 So.2d 1365, 1366 (citing *Cooper v. Oklahoma,* 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996)). A reviewing court owes the trial court's determinations as to the defendant's competency great weight, and the trial court's ruling thereon will not be disturbed on appeal absent a clear abuse of discretion. *Bridgewater,* 823 So.2d at 888; *Martin,* 769 So.2d at 1169. The testimony of Dr. Richoux and the reports submitted by the four other psychiatrists/psychologists, though they differ as to the seriousness of his condition, all indicate that Snyder had legal capacity at the time of trial. Thus, given the testimony and evidence presented in the *nunc pro tunc* hearing, we find that the weight of the evidence supports the trial court's ruling that it was possible to determine the defendant's competency and

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[11] The opinions of Drs. Salzer and Hannie are discussed *supra* p. 741.

that, in fact, the defendant was competent at the time of trial.

CONCLUSION

After reviewing the record of the hearing conducted by the trial court, we find that the lower court has complied with the procedural due process requirements that must be afforded him under *State v. Bennett*, 345 So.2d 1129.[12] The testimony and evidence presented during the *nunc pro tunc* hearing support the trial court's determinations of competency. Specifically, the testimony of Dr. Richoux is convincing as to the ability of the defendant to communicate with his counsel and as to the defendant's cognitive ability to understand the nature of the proceedings during the trial. Thus, we find no error in the lower court's ruling that the defendant was legally competent to stand trial.

DECREE

In accordance with the above reasons assigned by this Court, we unconditionally affirm the judgment of the trial court and the sentence of death. In the event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that court denies his petition for certiorari; and either (a) the defendant, having filed for or and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that court

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[12] *See also Cooper*, 517 U.S. at 354, 116 S.Ct. at 1377; *Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956); *State v. Nomey*, 613 So.2d 157 (La.1993).

denies his petition for rehearing, the trial judge shall, upon receiving notice from this Court under La.C.Cr.P. art. 923 of finality of direct appeal, and before signing the warrant of execution as provided by La. R.S. 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under La. R.S. 15:149.1; and (2) to litigate expeditiously the claims raised in that original application, if filed in the state courts.

AFFIRMED.

SHORTESS, J., (ad hoc.) concurs.

I agree with the majority's finding that the *nunc pro tunc* hearing amply demonstrated that it was possible for the Trial Court to determine the defendant's competency to stand trial retrospectively and that he was competent to stand trial.

I write further to point out that during the mitigation stage of the penalty phase Allen J. Smith, a fleet superintendent for a barge and shipyard operation, who had employed defendant for seven or eight years, testified for the defendant.

In an open ended question coming at the conclusion of his direct examination witness Smith was asked by counsel, "is there any particular incident that stands out in your mind that Allen many [sic] have participated in . . . . . ?" The question drew a hearsay objection from the state. Witness Smith then responded "okay, he saved a man's life on . . . that fell over board on the bow of a

barge". The State objected again stating it had not been shown that the witness personally saw defendant saving a man. Smith was not a personal observer, so the Trial Court instructed the Jury to disregard the comment. Assuming the fact to be true and competently proven the Jury was never able to consider in mitigation whether defendant, convicted with taking a life in the first degree, in fact, had earlier saved a life.

Mr. Smith was an excellent mitigation witness, who testified also, that he had watched defendant progress from laborer to welder, to fitter, to crane operator and finally to night dispatcher. He stated, "My impression in dealing with him, Allen, was that he was a very caring person."

Counsel points to nothing else during trial that could have negatively impacted upon defendant's present legal competence that the Trial Court found. In my opinion it was not a "lack of focus or competency" problem that kept the Jury from hearing the facts about the defendant's "lifesaver experience."

I respectfully concur in the result, which unconditionally finds defendant competent during this trial, which makes the conviction and sentence final.

United States of America, ss:

THE PRESIDENT OF
THE UNITED STATES OF AMERICA

04-6530

ALLEN SNYDER,

Petitioner

v.

LOUISIANA

To the Honorable the Justices of the Supreme Court of Louisiana.

GREETINGS:

Supreme Court of Louisiana case, **STATE OF LOUISIANA v. ALLEN SNYDER,** case No. 98-KA-1078, was submitted to the **SUPREME COURT OF THE UNITED STATES** on the petition for a writ of certiorari and response thereto, and the Court having granted this petition.

It is ordered and adjudged on June 27, 2005, by this Court that the judgment of the above court in this cause is vacated, and the case is remanded to the Supreme Court of Louisiana for further consideration in light of *Miller-El* v. *Dretke*, 545 U.S. ___ (2005).

THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and Laws of the United States.

Witness the Honorable **WILLIAM H. REHNQUIST,** Chief Justice of the United States, the 27th day of June, in the year Two Thousand and Five.

/s/ William K. Suter
Clerk of the Supreme Court
of the United States

Supreme Court of the United States

No. 04-6530

ALLEN SNYDER,

Petitioner

v.

LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Louisiana.

THIS CAUSE having been submitted on the petition for a writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the above court is vacated, and the case is remanded to the Supreme Court of Louisiana for further consideration in light of *Miller-El* v. *Dretke*, 545 U.S. ___ (2005).

June 27, 2005

942 So.2d 484

STATE OF LOUISIANA

v.

ALLEN SNYDER

Supreme Court of Louisiana

No. 1998-KA-1078.

Sept. 6, 2006.
Rehearing Denied Dec. 15, 2006.

Capital Appeals Project, Jelpi P. Picou, Jr., Marcia A. Widder, Aneel L. Chablani, for applicant.

Charles C. Foti, Jr., Attorney General, Paul D. Connick, Jr., District Attorney, Terry M. Boudreaux, James A. Williams, Alfred A. Olinde, Jr., Assistant District Attorneys, for appellee.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

WEIMER, Justice*

Defendant was convicted of first degree murder and sentenced to death. On direct appeal, this court ultimately affirmed defendant's conviction and sentence. Currently, the case is on remand from the United States Supreme Court, which directed that we again review defendant's *Batson* claims, this time in light of *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). After reviewing defendant's *Batson* complaints cumulatively in light of the entire record as directed by *Miller-El*, we find the

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* Retired Judge Fred C. Sexton, assigned as Associate Justice *Ad Hoc.*, sitting for Associate Justice Jeannette T. Knoll, recused.

trial court did not err in determining the venirepersons were not excused by the State in a racially discriminatory manner. Therefore, for the reasons that follow, the judgment affirming defendant's conviction and sentence is reinstated.

FACTS AND PROCEDURAL HISTORY

Defendant was indicted in Jefferson Parish for the first-degree murder of Howard Wilson.[1] On June 28, 1996, defense counsel was notified in writing that the State was seeking the death penalty. A trial was subsequently held. During voir dire, defendant charged that the State exercised several of its peremptory challenges against African-American prospective jurors in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The trial court denied defendant's *Batson* challenges. Consequently, defendant, who is African-American, was tried by an all-white jury. On August 29, 1996, the jury found defendant guilty as charged. After finding the presence of one aggravating circumstance,[2] the same jury unanimously determined defendant should receive the death penalty. The trial court subsequently imposed a sentence of death.

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[1] The specific facts of the crime for which defendant was convicted are discussed in *State v. Snyder*, 98-1078 (La.4/14/99), 750 So.2d 832 (*Snyder I*).

[2] The jury specifically found that defendant "knowingly created a risk of death or great bodily harm to more than one person." *Snyder*, 98-1078 at 3 n. 2. 750 So.2d at 837 n. 2. Snyder's estranged wife, Mary, was in a vehicle with Howard Wilson when defendant attacked both. Wilson died at the hospital, but Mary survived the attack and testified at trial. *Id.*, 98-1078 at 3, 750 So.2d at 836.

Defendant appealed his conviction and sentence directly to this court pursuant to La. Const. art. V, § 5(D), which provides that a case shall be appealable to the supreme court if the defendant has been convicted of a capital offense and a penalty of death actually has been imposed. This court reviewed defendant's *Batson* claims and concluded the trial court did not abuse its discretion or err in its denial of the claims. *State v. Snyder,* 98-1078, p. 11 (La.4/14/99), 750 So.2d 832, 842 (*Snyder I*). Thus, we conditionally affirmed defendant's conviction and sentence, but remanded the case to the trial court for a retrospective determination of defendant's competency at the time of trial, if one could be made. *Id.,* 98-1078 at 43, 750 So.2d at 863.

Following our remand, the trial court held a bipartite hearing to determine whether a *nunc pro tunc* ruling could be made with respect to defendant's competency at the time of trial and whether defendant was competent to proceed with trial. The trial court ruled that a retrospective determination of defendant's competence was possible and that defendant was competent at the time of trial. Defendant appealed these rulings to this court. Upon finding the trial court complied with procedural due process requirements and the testimony and evidence supported the trial court's determination of competency, this court unconditionally affirmed the judgment of the trial court and sentence of death. *State v. Snyder,* 98-1078, p. 11 (La.4/14/04), 874 So.2d 739, 745 (*Snyder II*).

Subsequently, the Supreme Court of the United States granted defendant's petition for a writ of certiorari, vacated the judgment of this court, and remanded the case for further consideration in light of *Miller-El,* 545 U.S.

231, 125 S.Ct. 2317.[3] *Snyder v. Louisiana*, ___ U.S. ___, 125 S.Ct. 2956, 162 L.Ed.2d 884 (2005).

LEGAL PRECEPTS

The Equal Protection Clause of the United States Constitution prohibits engaging in purposeful discrimination on the grounds of race in the exercise of peremptory challenges. *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719. The *Miller-El* decision that forms the basis for this remand was the third in a trilogy of Supreme Court opinions related to the allegedly discriminatory exercise of peremptory challenges in criminal trials. The trilogy presents a pendulous treatment by the Court of the issue of the evidentiary burden placed on a criminal defendant who claims that equal protection has been denied through the State's use of peremptory challenges to exclude individuals from the petit jury on the basis of race.

In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), the Supreme Court recognized that a State's purposeful or deliberate denial of participation as

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[3] This was the second *Miller-El* opinion rendered by the Supreme Court. In the first, *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), the Court did not address the merits of petitioner's claim to federal habeas relief from a state court conviction for capital murder. The procedural posture of the case at that time was that the federal District Court had denied the petition and the federal Court of Appeals had denied a certificate of appealability (COA). The Supreme Court granted certiorari and reversed, finding that a COA should have issued. The Court found the District Court did not give full consideration to the substantial evidence petitioner put forth in support of a prima facie case; instead, it accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in petitioner's trial.

jurors on account of race violates the Equal Protection Clause. Reviewing the "very old credentials" of the peremptory challenge system, the Court noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." Id., 380 U.S. at 219, 85 S.Ct. at 835. The majority of the Court sought to accommodate both the prosecutor's historical privilege of peremptory challenge free of judicial control and the constitutional prohibition on exclusion of persons from jury service on account of race. Because the State may not exercise its challenges in contravention of the Equal Protection Clause, the Court held it was impermissible for a prosecutor to use challenges to exclude African-Americans from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to them "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.*, 380 U.S. at 224, 85 S.Ct. at 838. Thus, proof by a defendant that members of his race were struck from his jury was insufficient; a defendant's burden was to show the circumstances under which prosecutors were responsible for striking minority jurors beyond the facts of a particular case. *Id.* 380 U.S. at 223-228, 85 S.Ct. at 838-840. Proof of repeated striking of African-Americans over a number of cases was necessary to establish a violation of the Equal Protection Clause.

Twenty-one years after *Swain*, the Court swung the pendulum in the opposite direction, finding that the evidentiary formulation of *Swain* was inconsistent with standards that had developed during those years for assessing a prima facie case under the Equal Protection Clause. In *Batson*, 476 U.S. at 92-93, 106 S.Ct. at 1721, the Court called the *Swain* requirement "a crippling

burden of proof" that had made prosecutors' peremptory challenges "largely immune from constitutional scrutiny." The Court held that a defendant could establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Evidence of a pre-existing pattern of discrimination in previous cases was no longer required.

Another 19 years later, in *Miller-El*, the Supreme Court moved the pendulum back toward middle ground. Stating that although the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain's* "wide net," the Court noted the net should not have been consigned to history; *Batson's* individualized focus had an inherent weakness of its own caused by its very emphasis on the particular reasons a prosecutor might give. "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*." *Miller-El,* 545 U.S. at 240, 125 S.Ct. at 2325. Thus, the Court reiterated – this time in a habeas proceeding[4] – *Batson*'s explanation

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[4] The defendant's habeas petition sought review pursuant to 28 U.S.C.A. § 2254, which was explained by the Court as follows:

> Where 28 U.S.C. § 2254 applies, [the Court's] habeas jurisprudence embodies [significant] deference. Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2).

Miller-El, 537 U.S. at 340, 123 S.Ct. at 1041.

that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination. *Id.*[5]

Nevertheless, the Court left the *Batson* test intact in *Miller-El* and reaffirmed that position in *Rice v. Collins*, 546 U.S. 333, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006). Louisiana law codifies the *Batson* ruling in LSA-C.Cr.P. art. 795(C), which provides:

> No peremptory challenge made by the state or the defendant shall be based solely upon the race of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race, and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory racially neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.

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[5] The concern expressed by the majority of the Supreme Court in *Swain*, 380 U.S. at 219, 85 S.Ct. at 825, for accommodating the prosecutor's historical privilege of peremptory challenge was eroding as early as *Batson*, 476 U.S. at 102-103, 106 S.Ct. at 1726, when Justice Marshall, concurring with the majority stated: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." Currently, in *Miller-El*, 545 U.S. at ___, 125 S.Ct. at 2342-2344, Justice Breyer, in a concurrence, noted that peremptory challenges are increasingly anomalous in our judicial system. He wrote, "If used to express stereotypical judgments about race, gender, religion or national origin, peremptory challenges betray the jury's democratic origins and undermine its representative function." Justice Breyer concluded that *Miller-El* illustrated the necessity of reconsideration of the *Batson* test and the peremptory challenge system as a whole. *Id.*

The race-neutral explanation need not be persuasive or even plausible. *Collins,* ___ U.S. at ___, 126 S.Ct. at 973-974, *quoting Purkett v. Elem,* 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). It will be deemed race-neutral unless a discriminatory intent is inherent in the explanation. The ultimate burden of persuasion as to racial motivation rests with, and never shifts from, the opponent of the peremptory challenge. *State v. Tyler,* 97-0338, p. 3 (La.9/9/98), 723 So.2d 939, 942, *cert. denied*, 526 U.S. 1073, 119 S.Ct. 1472, 143 L.Ed.2d 556 (1999). The trial court's findings with regard to a *Batson* challenge are entitled to great deference on appeal. *Id.* at 4;[6] *see also, State v. Juniors,* 03-2425, p. 28 (La. 6/29/05), 915 So.2d 291, 316. When a defendant voices a *Batson* objection to the State's exercise of a peremptory challenge, the finding of the absence of discriminatory intent depends upon whether the trial court finds the prosecutor's race-neutral explanations to be credible. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Miller-El v. Cockrell,* 537 U.S. 322, 339, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931 (2003).

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[6] We note the standard of review in a federal habeas case is different from that on direct appeal. In the context of a direct review of a *Batson* issue, the trial court's decision on the ultimate question of discriminatory intent by the State is a finding of fact accorded great deference, which finding will not be overturned unless clearly erroneous. *Miller-El,* 537 U.S. at 340, 123 S.Ct. at 1041. "Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire,* is not as well positioned as the trial court is to make credibility determinations." *Id.,* 537 U.S. at 339, 123 S.Ct. at 1041.

The three-step *Batson* process which guides the courts' examination of peremptory challenges for constitutional infirmities has recently been described again by the Supreme Court as follows:

> A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, the second step of this process does not demand an explanation that is persuasive, or even plausible; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating the persuasiveness of the justification proffered by the prosecutor, but the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. [Internal quotations and citations omitted.]

Collins, ___ U.S. at ___, 126 S.Ct. at 973-74.

The Court's decision in *Miller-El*, 545 U.S. 231, 125 S.Ct. 2317, a multifaceted and fact-bound opinion on the merits of defendant's claim to habeas relief, further clarifies the analysis to be used in *Batson*'s third and final

step.[7] Although the case is a federal habeas case, it nevertheless indicates the type of evidence to be considered and the appropriate scope of an evaluation of the prosecutor's reasons to be applied by the trial court at the time a *Batson* challenge is raised, which are later pertinent to direct review by the appellate courts.

The *Miller-El* opinion begins by recognizing *Batson*'s weakness is its "very emphasis on the particular reasons a prosecutor might give." *Miller-El*, 545 U.S. at 240, 125 S.Ct. at 2325. The Court continued, "Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand." *Id. Miller-El*, therefore, redirects attention to "*Batson*'s

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[7] The Court had previously noted that the defendant had been indicted for capital murder in Texas. *Miller-El*, 537 U.S. at 328, 123 S.Ct. at 1035. He pled not guilty and jury selection took place during five weeks in February and March of 1986. When *voir dire* concluded, defendant moved to strike the jury on grounds that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African-Americans through the use of peremptory challenges. Defendant's trial occurred prior to the Court's decision in *Batson*, while *Swain* was controlling precedent. As that case required, defendant sought to show that the prosecution's conduct was part of a larger pattern of discrimination aimed at excluding African-Americans from jury service. In a pretrial hearing, defendant presented extensive evidence in support of his motion. *Id.*

The Texas district court denied the motion to strike the jury, and 12 days later the jury found defendant guilty. The trial court sentenced him to death. *Id.*

Defendant appealed to the Texas Court of Criminal Appeals. While that appeal was pending, on April 30, 1986, the Supreme Court decided *Batson*. The Texas Court of Criminal Appeals remanded the case for new findings in light of *Batson*, and a post-trial hearing was held in 1988, two years after the allegedly discriminatory *voir dire*. *Id.*, 537 U.S. at 328-329, 123 S.Ct. at 1035.

explanation that a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination," *Id.*, and to the trial judge's duty under *Batson* "to assess the plausibility" of the prosecutor's proffered reason for striking a potential juror "in light of all *evidence* with a bearing on it." (Emphasis supplied.) *Id.*, 545 U.S. at 252, 125 S.Ct. at 2331.[8]

In stating that the trial court must evaluate the prosecutor's proffered reasons to determine whether they are pretextual for a discriminatory intent, the Court made it abundantly clear that while a prosecutor might have some difficulty explaining his strikes that are oftentimes based on instinct, he simply must attempt to put his feelings into words. A trial court cannot overrule the *Batson* challenge merely because the court itself can envisage a race-neutral reason that could explain the use of a peremptory challenge against that individual. In this regard, the Court plainly stated that when "illegitimate grounds" such as race are in issue, a prosecutor simply must state his reasons "as best he can and stand or fall on the plausibility of the reasons he gives." *Id.*, 545 U.S. at 252, 125 S.Ct. at 2332.[9]

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[8] One of the arguments defendant's appellate counsel makes would take us outside the four corners of the appellate record for so-called proof "that race discrimination is routine in Jefferson Parish." We decline to address this "historic discrimination" issue as the details of counsel's argument are not evidence. We do not view *Miller-El*, a habeas proceeding in federal court, as license to consider matters that are dehors the record which is before us on direct appeal.

[9] This requirement is arguably at odds with the Louisiana statutory provision that provides "the court *may* demand a satisfactory racially neutral reason for the exercise of the challenge, *unless the court is satisfied that such reason is apparent from the voir dire examination of the juror.*" (Emphasis supplied.) LSA-C.Cr.P. art. 795(C). In the

(Continued on following page)

After a detailed discussion of all the evidence presented in support of defendant's *Batson* challenge, the Court concluded that the totality of the evidence showed the trial court was unreasonable and erroneous in determining the prosecutor's strikes of two potential jurors were not racially motivated. The Court summarized the myriad pieces of evidence that together yielded its decision. The Court found the existence of several disturbing factors that together indicated the prosecution's proffered race-neutral reasons were mere pretext for discriminatory intent: (1) the "bare statistics," which showed that out of 20 black members of the 108-person venire panel, only 1 served, *Id.*, 545 U.S. at 240, 125 S.Ct. at 2325; (2) a "comparative juror analysis," or a side-by-side comparison, of some African-American panelists who were struck and white panelists who were allowed to serve, *Id.*, 545 U.S. at 239-53, 125 S.Ct. at 2325-32; (3) the "broader patterns of practice" that occurred during jury selection, which included inexplicable jury shuffling[10] and disparate questioning of

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instant case, the prosecutor volunteered race neutral reasons each time defense counsel made a *Batson* objection. Thus, it is unnecessary for us to address reconciliation of the Louisiana provision with the mandate of *Miller-El*. We do observe, however, that the Louisiana statute's grant to the trial court of broad discretion in ruling on a *Batson* objection in light of apparent reasons from the voir dire may have been interpreted by the trial court as alleviating any necessity for explanation by the court of its reasons for allowing the State's peremptory challenges.

[10] Jury shuffling was explained in *Miller-El*. Texas law permits either side in a criminal case to shuffle the cards bearing panel member names to rearrange the order in which they are questioned. Members seated in the back may escape *voir dire*, for those not questioned by the end of each week are dismissed. The Court noted the prosecution had shuffled the cards when a predominate number of African-Americans were seated at the front of the panel. *Miller-El*, 545 U.S. at 252-55, 125 S.Ct. at 2332-2333.

African-American and non-African-American panelists, *Id.*, 545 U.S. at 252-62, 125 S.Ct. at 2332-38; and (4) historical evidence that the particular District Attorney's office involved in the case had for decades followed a known, formal, and specific policy of systematically excluding African-Americans from juries, *Id.*, 545 U.S. at 262-66, 125 S.Ct. at 2338-39. The Court readily acknowledged that the significance of some of the evidence of discriminatory intent was "open to judgment calls," but reasoned that when the evidence was viewed cumulatively, it was "too powerful to conclude anything but discrimination." *Id.*, 545 U.S. at 265, 125 S.Ct. at 2339.

The *Miller-El* opinion does not dwell on the trial court's credibility determination in favor of the prosecution. However, the Court's next *Batson*-third-step case, *Collins*, illustrates the difficulties courts face in attempting to review a trial court's resolution of a *Batson* challenge. In that case, a *Batson* challenge was made after the prosecution struck a young, African-American female panelist, and the challenge was rejected by the state courts and the federal district court. However, when defendant sought collateral habeas corpus relief in the federal courts, the Ninth Circuit Court of Appeals reversed on grounds that the trial court had acted unreasonably by crediting the prosecutor's race-neutral reasons for striking the juror. *Collins v. Rice,* 348 F.3d 1082 (9 Cir.2003), *amended and superseded by,* 365 F.3d 667 (9 Cir.2004).

The Supreme Court reversed, finding the Court of Appeals had "improperly substituted its evaluation of the record for that of the state trial court." *Collins,* ___ U.S. at ___, 126 S.Ct. at 973. The Court found the record did not demonstrate that a reasonable factfinder must necessarily

conclude the prosecutor lied about his reasons for striking the panelist. *Id.* at 975.

Thus, the most recent admonition by the Supreme Court on jury selection after *Batson* focuses, not on a reviewing court's stringent parsing of a prosecutor's race-neutral reasons to ferret out pretext masking discriminatory intent, but on the leeway a reviewing court must grant a trial court in its evaluation of the credibility of the prosecutor in the third step of the *Batson* analysis. One clear difference between *Collins* and *Miller-El* is that there was no evidence that issues of race pervaded the entire voir dire in *Collins*. Furthermore, there was nothing beyond the four corners of the *Collins* voir dire to cause the Court to question the sincerity of the prosecutor's challenges.

Notwithstanding the differences and similarities of *Miller-El* and *Collins*, the focus of the *Batson* framework is "to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson v. California,* 545 U.S. 162, 172, 125 S.Ct. 2410, 2418, 162 L.Ed.2d 129 2005) (Permissible inferences of discrimination were sufficient to establish a prima facie case of discrimination, which satisfied the first *Batson* step.) While *Miller-El* indicates the type and quantum of evidence to be considered at *Batson*'s third step, *Miller-El*, *Collins*, and *Johnson* add no new elements to the venerable *Batson* analysis. *See Murphy v. Dretke,* 416 F.3d 427, 439 (5 Cir.2005) ("The Court did not announce any new elements or criteria for determining a *Batson* claim, but rather simply made a final factual and evidentiary determination of that particular petitioner's *Batson* claim."); Amanda S. Hitchcock, "*Deference Does Not By Definition Preclude Relief*": *The Impact of Miller-El v.*

Dretke on Batson Review in North Carolina Capital Appeals, 84 N.C. L.Rev. 1328, 1330 (2006). Consequently, while *Miller-El* requires a somewhat expanded review of defendant's *Batson* claims, we perform our review pursuant to the typical *Batson* framework and the Louisiana constitutional and statutory provisions.

APPLICATION OF PRINCIPLES

Miller-El and *Collins* necessarily shape this court's response to the Supreme Court's present remand order and our reconsideration of the *Batson* issue, but do not require a detailed reconsideration of the voir dire of the five African-American prospective jurors peremptorily struck by the State. As we stated in *Snyder I,* the State's use of five of its peremptory challenges to strike African-American prospective jurors who survived challenges for cause resulted in defendant's being tried by an all-white jury.[11] Now defendant re-argues that the State's use of "close to half" of its peremptory strikes to "exclude an entire group comprising only fourteen percent of the qualified pool" is compelling evidence that the State's strikes were made on the impermissible basis of race.

Considering this argument, this court's current task is eased by an initial winnowing out of some of the challenged

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[11] As noted in defendant's brief on remand, the only African-American venire person not stricken by the State, Jacqueline Woods, was in the seventh panel, which was questioned to seat two alternate jurors after the twelve-member jury had already been selected. None of the alternates sat. We agree with defendant's appellate counsel that the selection of Woods does not defeat defendant's *Batson* claim. *See State v. Harris,* 01-0408 (La.6/21/02), 820 So.2d 471 (*Batson* error required new trial, despite presence of one African-American on the jury.)

jurors. Currently, defense counsel makes no argument with regard to Loretta Walker, almost certainly because the record offers ample affirmative support for the prosecutor's challenge.[12]

With respect to two other prospective jurors, Greg Scott and Thomas Hawkins, Jr., this court previously found that the defendant waived any *Batson* claim on appeal by failing to object when the prosecutor struck the jurors, although defense counsel noted their race for the record. More importantly, defense counsel did not ask the prosecutor to articulate his race-neutral reasons for excusing Greg Scott and Hawkins when the *Batson* challenge was posed after the State struck Elaine Scott from the third panel of prospective jurors. *Snyder*, 98-1078 at 7-8, 750 So.2d at 839-40.[13] There is nothing in *Miller-El* or

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[12] Walker stated initially that she could not consider the death penalty under any circumstances. Upon further questioning, Walker conceded that she could consider capital punishment in the case of the murder of a child. As the prosecutor informed the trial court, this case did not involve the killing of a child, and he therefore excluded Walker peremptorily on the basis of her general opposition to the death penalty.

[13] Because the State had accepted Jeffrey Brooks in the first panel of prospective jurors, the strikes exercised against Greg Scott in the second panel and Hawkins in the third panel did not reveal any pattern of exclusions which might have supported an objection on *Batson* grounds. However, the care with which defense counsel noted the race of the jurors for the record placed both the State and the trial judge on notice that a *Batson* challenge might be forthcoming. Defense counsel then made the challenge during the examination of the third panel of prospective jurors and at that point could have argued that the State should also have to defend its strikes against Scott and Hawkins because they formed part of a pattern that became apparent with the later strike of Elaine Scott. However, counsel did not argue for the inclusion of Greg Scott and Hawkins in his *Batson* challenge, thereby prompting this court's procedural default on appeal of this aspect of the State's jury selection.

(Continued on following page)

Collins that casts doubt on the correctness of this portion of *Snyder I*.

Despite defense counsel's reiteration of the argument concerning the remaining two potential jurors, we turn to our previous decision regarding these persons:

> Defense counsel did . . . lodge the proper *Batson* objections to the State's use of peremptory challenges against potential jurors Jeffrey Brooks [and] Elaine Scott. . . . The State originally accepted Brooks as a juror, but later backstruck him. The prosecutor's reasons for striking Brooks were that he appeared "very nervous" throughout questioning and that he would be missing class, as a student teacher, if chosen to serve on the jury. The prosecutor stated, "He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase."[14] Defense counsel responded by stating:
>
> > His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student

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This court further found that counsel's failure to expand the basis of the *Batson* objection did not constitute ineffective assistance because the State's exclusion of Scott and Hawkins did not directly and fundamentally impact the integrity of the fact-finding process at trial. *Snyder*, 98-1078 at 11-12, 750 So.2d at 842, *citing Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[14] Before the court allowed the State's exercise of a peremptory challenge of Brooks, the State explained further: "If this case goes to the jury on Friday and one of them gets back there and gets smart and thinks that if they come back [with] guilty of second degree murder, they won't have to do a penalty phase. I guarantee that's a very real concern."

> teacher. The clerk called the school and whoever it was and the Dean said that wouldn't be a problem. He was told that this would go through the weekend, and he expressed that that was his only concern, that he didn't have any other problems.
>
> As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous.

The court allowed the State to exercise a peremptory challenge on Brooks.

With respect to prospective juror Elaine Scott, the district attorney excused her, stating, "I observed she was very weak on her ability to consider the imposition of the death penalty. Her words, exactly – I wrote it down, that she thinks she could, and that's the reason for our challenge." However, when asked again by the prosecution if she could impose the death penalty, she responded, "I could." She also responded affirmatively when asked if she could listen to the evidence and consider whether to accept or reject the insanity defense and hold the defense to its burden of proof. Nevertheless, the trial court accepted the State's explanation as race neutral and excused Elaine Scott.

. . . .

The trial court entertained the State's race neutral reasons for the exclusions without making a finding as to whether defendant had made a prima facie showing of purposeful racial discrimination. A trial court's "demand that a prosecutor justify his use of peremptory strikes is tantamount to a finding that the defense has

produced enough evidence to support an inference of discriminatory purpose." *State v. Green,* 94-0887, p. 25 (La.5/22/95), 655 So.2d 272, 288. Nevertheless, the issue of whether the defense established a prima facie case of discrimination is moot once the prosecutor has offered a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination. *Id.* (applying *Hernandez v. New York,* 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)). Nonetheless, any response will qualify as race neutral "unless a discriminatory intent is inherent in the prosecutor's explanation." *Hernandez v. New York,* 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

Here, the trial court did not find that defendant had established purposeful discrimination and overruled the *Batson* objections. These rulings appear correct. Although not required by the caselaw, the State's proffered reasons were plausible, supported by the record and race-neutral. [Citations omitted.] The prosecutor's reasons constituted "legitimate" grounds for the exercise of a peremptory strike. [Citation omitted.] None of the reasons articulated by the State are readily associated with the suspect class that is alleged to be the object of the State's discriminatory use of peremptory challenges. Defendant, the opponent of the strikes, offered no facts or circumstances supporting an inference that the State exercised its strikes in a racially discriminatory manner. Therefore, the defendant's proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent. *See State v. Green,* 94-0887 at p. 27, 655 So.2d at 289.

> After carefully reviewing the entire record of voir dire, we find no abuse of discretion or error by the trial court in its denial of defendant's *Batson* claims. The trial court heard the prospective jurors and concluded there were reasonable bases for the challenges in question. The record does not show that the State employed a tactic of purposeful discrimination in its exercise of peremptory challenges. [Record references and footnote omitted.]

Snyder, 98-1078 at 9-11, 750 So.2d at 840-842.

Contrary to defense counsel's argument on remand,[15] we do not read the Supreme Court's remand as a "rejection of the analysis performed" in *Snyder I* with regard to defendant's "claim that the prosecutor in his case was illegally removing African-American venire persons based on their race in violation of *Batson*." Although the Supreme Court vacated the judgment and ordered reconsideration in light of *Miller-El*, we view the remand as a mere expansion of our review, not a rejection of the analysis made solely on a careful review of "the entire record of the voir dire." *Snyder*, 98-1078 at 11, 750 So.2d at 842.

Nevertheless, we have conducted another review of the voir dire transcript and find nothing there to disparage the above quoted *Batson* analysis conducted by this court in *Snyder I*. Indeed, our review uncovered a factor favorable

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[15] Defendant's current counsel was not involved in his representation at any stage of the trial or direct appeal. The Capital Appeals Project undertook representation following the denial of rehearing by this court on June 25, 2004, and prepared and filed the Petition for Writ of *Certiorari* to the Supreme Court of the United States.

to the State's use of a peremptory challenge to backstrike Brooks that was not mentioned in *Snyder I*.

At the beginning of the voir dire, the trial court gave a brief explanation of the jury selection process. The court announced the eligibility requirements for jury service and then asked the members of the venire who had any basis for disqualification or a significant reason that would warrant excusal to approach the bench. Each venire member approached the bench individually and provided his or her reason for ineligibility or for excusal. Some persons were questioned further by the State or the defense as to their reasons, and then the court either excused them or denied their requests.

During this preliminary voir dire process, the State consistently inquired of a potential juror whether or not his or her particular problem would prevent concentration on the evidence so as to impair the juror's decision-making task. For example, when speaking to potential juror Chauffe, a single-mother of a school-aged child who claimed transportation problems, the prosecutor asked: "If you got selected on this jury anyway, despite what you're telling us, do you think that you would be able to pay attention to the evidence in the case, and listen to the Judge, and be a good juror? Or do you feel you would be worrying too much and not be able to listen to the evidence?" When Chauffe answered the second question affirmatively, the court excused her. The prosecutor asked the same type of question of prospective jurors Pickett, Nguyen, Laws, Perkins, and Miller.

Later, when the State exercised a peremptory challenge to backstrike Brooks, the race-neutral reason given was the prosecutor's reservations about this student

teacher's ability to consider the issues without being distracted by his concerns about school. This reason was consistent with the concern voiced in the questioning of other potential jurors during the pre-voir dire process mentioned above.

Further, acknowledging that the peremptory challenge of Brooks requires a more detailed discussion than the challenge of Scott, we note defense counsel's comparison of the State's challenge of Brooks with the State's acceptance of Yeager and Sandras,[16] both white males on the fifth panel.[17] Yeager expressed concern with jury service because he had a commitment to an event scheduled for Sunday that he had been an integral part of for many years. Sandras reported he taught at the University of New Orleans, had just begun the semester, and would have a problem with any "prolonged absence." We note that both of these men were employed and apparently already had established careers; Brooks, on the other

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[16] Defense counsel also argues the State's challenge of Brooks was inconsistent with the prosecutor's failure to question McMurray about her concerns over a court-reporting course at Franklin College that she was just starting. Although McMurray approached the bench during the pre-voir dire process, her chief articulated concern was someone to take care of her two-and-a-half year old daughter. The court did not excuse her prior to the questioning of the second half of the second panel of jurors. During the prosecutor's questioning of the panel about the insanity defense, McMurray's responses indicated such a strong reservation concerning that defense that the responses obviated the need for questioning her about her ability to concentrate despite her personal problems. Subsequently, there was a predictable defense challenge for cause of this prospective juror that was granted by the court.

[17] By the time the fifth panel was called, the State had already backstruck Brooks.

hand, was attempting to complete his college courses in order to begin a career in teaching.

The fact that Brooks actually approached the bench on his own volition and raised his teaching obligations as a hardship excuse indicates he was truly concerned, more so than Sandras and Yeager. When Brooks approached the bench to raise a hardship concern at the beginning of the jury selection proceeding, Brooks stated to the court that "there is something I'm missing right now that will better me towards my teaching career." On the other hand, Sandras and Yeager merely responded to defense counsel questioning posed to their panel regarding any jurors' personal reasons or pre-existing obligations which would make it difficult to concentrate or serve on the jury. Thus, Brooks initiated the concern about the trial being a hardship, while Sandras and Yeager merely responded to questions.

Defense counsel also would have us dismiss the State's claim that Brooks appeared nervous because certain questions Brooks asked during voir dire did not indicate nervousness. However, the fact that Brooks was articulate during the voir dire may have contributed to the prosecutor's fear that he would get "smart" during jury deliberation and suggest a verdict lesser than the death penalty. *See* Footnote 14, *supra*. Additionally, nervousness cannot be shown from a cold transcript, which is why only the trial judge can evaluate the demeanor of the juror and why the judge's evaluation must be given much deference. In *Collins*, the Supreme Court found that the Ninth Circuit had been too aggressive in its review and in its ultimate ruling which reversed the trial court's *Batson* rulings. The Supreme Court concluded the Ninth Circuit had improperly substituted its evaluation of the record for

that of the state trial court. *Collins,* ___ U.S. ___, 126 S.Ct. at 973, 163 L.Ed.2d 824.

There was no indication that race was the underlying reason for backstriking Brooks any more than race was a consideration in the prosecutor's questions to the other potential jurors. *See State v. Harris,* 01-0408, p. 8 (La.6/21/02), 820 So.2d 471, 476 (The comparison of the treatment of the potential jurors of different races has been utilized by this court in a measurement of the racially-neutral reason for the exercise of the prosecution's challenge.)

The final part of our analysis is based on a review of the record as a whole as instructed by the Supreme Court in *Miller-El,* 545 U.S. at 240, 125 S.Ct. at 2325, 2331 ("[A]ll relevant circumstances" and "all evidence with a bearing" on the *Batson* issue must be considered.) First, we consider the proceeding at which the issue of racial prejudice was raised prior to the beginning of voir dire.

At a July 29, 1996 hearing to determine whether the State would be permitted to introduce at trial evidence of five incidents of domestic violence allegedly committed by defendant against his estranged wife to show defendant's motive and intent, the State made reference to "another case that was on television everyday for the last couple of years . . . where this very thing happened."[18] Thereafter, on

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[18] This proceeding was a *Prieur* hearing at which defense counsel attempted to have the evidence excluded as being irrelevant. At the hearing, the State identified the five incidents that had been included in the *Prieur* notice: 1) In May of 1995, Snyder beat his wife with a baseball bat. 2) On March 11, at a club in Kenner, Snyder hit his wife's head into the window of his truck. 3) On June 11, 1995, Snyder pushed his wife's head through the sheetrock wall of their bedroom. 4) On June

(Continued on following page)

August 16, 1996, defense counsel filed a motion *in limine* specifically requesting the State be precluded at trial from referring to or making comparisons with O.J. Simpson or his trial, as such references would serve no purpose other than to confuse and prejudice the jury. The prosecutor responded:

> I think [the defense motion is] premature. . . . I can assure the Court that I'm not going to get up in my opening voir dire and say [that] "we're here for the Jefferson Parish O.J. Simpson . . . case." I have no intentions of doing that. I have no – perhaps in argument, I don't know.
>
> . . . .
>
> I have given the Court my word that I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case. . . . I just ask [the court] not to grant this motion.

After the hearing,[19] the trial court denied defendant's motion based on the prosecutor's representations.

18, 1995, at the home of the parents of Mary Snyder, Snyder accosted his wife as she slept, put his hand over her mouth, and stabbed her several times with a screwdriver. 5) On another occasion, in a telephone call, Snyder threatened his wife with more bodily harm. In context, the State's reference to the O.J. Simpson case was an illustration to the court of the relevance of such incidents. The trial court ruled evidence of all five of the incidents would be admissible at defendant's trial.

[19] In its motion, defense counsel stated:

> Surveys conducted since the verdicts in the O.J. Simpson trial have shown consistently that a large majority of white Americans believe the not guilty verdicts were wrong; many indicate that the verdicts have undermined their faith in

(Continued on following page)

Voir dire began against this backdrop on August 27, 1996.

Next, we note that the State did, in fact, make an indirect reference to the O.J. Simpson case during its rebuttal argument at the penalty phase of the trial. Because the reference was made during rebuttal, the reference was preceded by the following argument of defense counsel:

> [S]ome of the mitigating circumstances that we believe we've been able to demonstrate to you . . . [relate to] whether Mr. Snyder was under extreme emotional or mental influence at the time of this particular incident. . . . I really didn't have to do much to show facts that might suggest that, because the State, when they put on their case, . . . the officer from Kenner . . . said that when he found Allen Snyder a couple of hours or 12 hours or so after this incident, he was curled up in a fetal position. He was suicidal. He kept saying, "They're coming to get me. They're coming to get me." . . . [T]here's never been any indication that Mr. Snyder was somehow staging that particular incident in order to get himself a better situation or a better sentence or to help himself out in any way.

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the entire jury system. To play upon these fears and prejudices to what will doubtless be an overwhelmingly – if not all – white jury deciding the case with admitted similarities is an appeal to racism at worst and vigilante justice at best, and as such is specifically precluded by Louisiana law.

Despite the allegations of the defense motion, neither side introduced evidence at the hearing on the motion. Thus, the trial court's denial was based solely on the argument of counsel.

> The testimony of that officer was accurate and it was truthful. The other thing that he testified to was that that house was in shambles. The furniture was strewn all about. Furniture was put up . . . doors were barricaded. The furniture was being used as a barricade. . . . I'll ask you if that is not suggestive of some sort of [mental] disturbance.

The portion of the State's rebuttal argument that the defendant now complains about was in direct response to the above quoted argument. Specifically, the prosecutor stated:

> It's been very clear, and this is the last thing I'm going to say about Allen Snyder, that the kind of person he is, as Mr. Olinde described him in his opening statement, he's egocentric, and he has shown no remorse. More than that, as he stabbed his wife 15 times, put her through what Dr. Harkness described as a near-death experience, as she lay there gushing blood, as Mary Snyder sat in that seat right there, he left her there. He left her there to die. And when Detective Labat took the statement from him 12 hours later, . . . not a word at any time where you would have heard him, how's my wife? Is she okay? Not a word. Is that because he's depressed or because he's got a far deeper problem?
>
> Brief mention. Mr. Vasquez tried to describe this man as being the man who – And it was 12 hours later when he called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of – [At this point in the rebuttal argument,

> defense counsel voiced an objection, and both counsel approached the bench. The prosecutor argued the reference to the O.J. Simpson case was fair based on the similarities between what Synder did and what Simpson did, specifically pretending to be suicidal. The trial court overruled the defense objection.]
>
> The most famous murder case . . . happened in California very, very, very similar to this case. The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that's not what that man was thinking about when he called in and claimed that he was going to kill himself?

In brief to this court, defense counsel urges this court to consider that the prosecutors selected an all-white jury as a means of playing their "O.J. card, an argument that persuaded two members of the court, Justices Johnson and Lemmon, to dissent from the majority decision." *See Snyder*, 98-1078 at 3, 750 So.2d at 864 (Lemmon, J., concurring in part and dissenting in part) ("I find compelling the rhetorical question by defense counsel in oral argument before this court, asking whether the prosecutor would have ranted about O.J.'s getting away with it if he had not backstruck the only black juror toward the end of voir dire.")

However, other than suggesting inferences to be drawn from the bare facts of the prosecutor's remarks both prior to and subsequent to the voir dire, defense counsel points to no evidence in the record to substantiate defendant's claim of discriminatory use of the peremptory

challenges. The inferences defense counsel suggests are no more compelling than other race neutral inferences to be drawn when one considers the prosecutor's remarks in context. The remark at the motion in limine referred to the fact that the Simpson trial involved alleged domestic violence; the remark during rebuttal referred to the fact that Simpson feigned suicidal intent. Neither remark referred to Simpson's or Snyder's race. Counsel's citations to authorities concerning the Simpson trial never were, and are not now, part of the record before this court for review.

Miller-El directs that we cumulate all relevant items tending to point to racial discrimination and view them together when considering whether the trial court's determination of the existence of discrimination is clearly erroneous. Nevertheless, *Miller-El* directs that this court examine the precise reasons given by the State for its strike of Scott and Brooks. This court cannot attempt to hypothesize another reason that the State may have had for its strikes. As stated by the Court, the State must "stand or fall on the plausibility of the reasons he gives." *Miller-El,* 545 U.S. at 252, 125 S.Ct. at 2332. Consequently, we find that when the entirety of the record of defendant's case is reviewed, the record shows that the prosecution's stated reasons for striking Scott and Brooks were not pretextual. A review of this record compels a conclusion that race did not play an impermissible role in the exercise of these strikes.

When we view the totality of the evidence discussed herein, as *Miller-El* directs, despite the lack of the trial court's active participation in voir dire and its failure to articulate particularized reasons for its determination that the State's proffered reasons were not pretextual, we find

the trial court's decision to allow the strikes of Scott and Brooks was not clearly erroneous. Considering the evidence in the record before us, a contrary conclusion would be an improper substitution of this court's evaluation for that of the trial court similar to that struck down in *Collins*, ___ U.S. ___, 126 S.Ct. at 973, 163 L.Ed.2d 824. The record before us simply does not demonstrate that a reasonable factfinder must necessarily conclude the prosecutor lied about his reasons for striking Scott or Brooks. Applying *Miller-El* and *Collins*, the prosecutor's demeanor was evaluated by the trial court which found no discriminatory intent. The explanations were reasonable and the proffered rationale had some basis in accepted trial strategy.

We conclude defendant did not carry his ultimate burden of persuasion that the State exercised peremptory challenges in a purposefully discriminatory manner. We reiterate that Snyder's "proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent." *Snyder*, 98-1078 at 11, 750 So.2d at 842.

Accordingly, we reinstate the following decree.

DECREE

In accordance with the above reasons assigned by this court, we unconditionally affirm the judgment of the trial court and the sentence of death. In the event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that court denies his petition for certiorari; and either (a) the defendant, having filed for or and been denied certiorari, fails to petition the

United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that court denies his petition for rehearing, the trial judge shall, upon receiving notice from this court under LSA-C.Cr.P. art. 923 of finality of direct appeal, and before signing the warrant of execution as provided by LSA-R.S. 15:567(B), immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under LSA R.S. 15:149.1; and (2) to litigate expeditiously the claims raised in that original application, if filed in the state courts.

AFFIRMED.

KIMBALL, J., dissents and assigns reasons.

CALOGERO, C.J., dissents for reasons assigned by KIMBALL, J.

JOHNSON, J., dissents and assigns reasons.

KIMBALL, J., dissenting.

I believe that a review of the entirety of this record performed using the vigorous analysis directed by the *Miller-El* Court reveals the trial court erred in allowing the State to peremptorily challenge Mr. Brooks. Consequently, I dissent from the majority's conclusion that defendant did not prove the State exercised peremptory challenges in a purposefully discriminatory manner.

At the outset, the raw numbers characterizing the selection of defendant's jury must be noted as they were in

Miller-El. The State used five of its peremptory challenges to strike 100 percent of the African-American prospective jurors who survived challenges for cause. This resulted in defendant being tried by an all-white jury. Defendant argues that the State's use of "close to half" of its peremptory strikes to "exclude an entire group comprising only fourteen percent of the qualified pool" is compelling evidence that the State's strikes were made on the impermissible basis of race. While the fact that prosecutors used their peremptory strikes to exclude 100 percent of the eligible African-American panelists does not prove intentional racial discrimination, *Miller-El* cautions that "'[h]appenstance is unlikely to produce this disparity.'" *Miller-El,* 545 U.S. at 241, 125 S.Ct. at 2325 (quoting *Miller-El v. Cockrell,* 537 U.S. 322, 342, 123 S.Ct. 1029, 1042, 154 L.Ed.2d 931 (2003)). *See also State v. Trotter,* 280 Kan. 800, 127 P.3d 972, 981 (2006) ("[T]he trial court must avoid placing a determinative emphasis on any one factor. Although the trial court can objectively compare numbers or other facts, it must subjectively evaluate the credibility of the prosecutor as he or she explains the reasons for each challenged strike.").

As explained by the majority, voir dire began against a backdrop of the issues of race and prejudice when the State made reference to the O.J. Simpson case. Following defendant's protests, the prosecutor assured the court that he would not refer to O.J. Simpson during the voir dire and evidentiary portion of trial. However, these representations appear disingenuous because the prosecutor clearly referenced the O.J. Simpson case during its rebuttal argument at the penalty phase of the trial.

Considering this injection of racial issues, and the fact that the prejudicial arguments were made to an all-white

jury, I believe it is only reasonable to conclude that Mr. Brooks was peremptorily challenged by the State on the basis of his race when the entirety of the facts is considered. This is especially true in light of the fact that the trial court did not articulate its reasons for overruling the *Batson* challenge. While one may infer that the trial court found the State's reasons credible, this court, on appellate review, is not privy to the reasons for this credibility determination. One simply cannot tell whether it was something in the demeanor of the prosecution or in the behavior or attitude of Mr. Brooks that caused the trial court to believe the State's race-neutral reasons were not pretextual. The backstrike of Mr. Brooks followed the *Batson*-challenged peremptory strike of Ms. Scott, which had excluded the third of four African-American panelists to be examined. The State's backstrike of Mr. Brooks then removed the only African-American juror the State had accepted for service. With these circumstances as a backdrop, which *Miller-El* teaches are clearly relevant to the *Batson* analysis, the State's exercise of a peremptory challenge is suspicious.

The suspicions raised by the circumstances surrounding the exercise of the backstrike are not eased when the voir dire of Mr. Brooks is considered alone or when it is considered along with that of other panelists. The prosecutor stated he struck Mr. Brooks because he "looked very nervous" and the prosecutor was concerned that Mr. Brooks would vote in a way to avoid a penalty phase in order to go home quickly and miss less student teacher observation. However, the record reveals that when the trial court informed Mr. Brooks at the bench that Dr. Tillman did not see a problem as long as he missed only one week, Mr. Brooks simply responded, "Okay." He did

not voice any further concerns or ask any questions. When the defense pointed out that Mr. Brooks did not seem to have lingering concerns once the trial court related Dr. Tillman's response, the State did not retort or further explain this justification. Most importantly, the prosecutors did not ask one question of Mr. Brooks concerning his student teaching commitments or whether he had any lingering time-related anxieties not dispelled by the trial court's inquiries of Dr. Tillman when they subsequently questioned him. Had Mr. Brooks's concern about his student teaching commitments genuinely mattered to the State, it would seem to reason that the State would have questioned him about it to determine the extent of his concern. On this subject, the *Miller-El* Court quoted *Ex parte Travis,* 776 So.2d 874, 881 (Ala.2000) as follows: "The State's failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination." *Miller-El,* 545 U.S. at 246, 125 S.Ct. at 2328.

It is possible the State had genuine concern about Mr. Brooks's state of mind despite his apparent acceptance of Dean Tillman's assurances to the trial court. *Collins,* ___ U.S. at ___, 126 S.Ct. at 975 ("That the prosecutor claimed to hold such concerns despite Juror 16's *voir dire* averments does not establish that she offered a pretext."). However, there was no pre-strike foreshadowing of genuine State concern over the possibility of Mr. Brooks having time-schedule anxieties. No attempt was made by the State to verify its hypothesis and develop an objective basis for its strike. *See Miller-El,* 545 U.S. at 250, 125 S.Ct. at 2330-31 n.8 ("[T]he failure to ask undermines the persuasiveness of the claimed concern."); *State v. Harris,*

01-0408 at p. 8, 820 So.2d at 476 ("[T]he fact that potential jurors are challenged on the basis of a claimed bias, without being questioned about such a bias, 'raises a strong inference that they were excluded on the basis of race alone.'") (quoting *Williams v. State,* 548 So.2d 501, 507 (Ala.Cr.App.1988)).

The second justification the prosecutor gave for striking Mr. Brooks was that he "looked very nervous." Later, another prosecutor added that he was "very uncertain." Defense counsel immediately challenged the State's characterization of Mr. Brooks's demeanor, stating "[E]verybody out here looks nervous. I'm nervous." *Cf. State v. Hobley,* 98-2460, p. 21 (La.12/15/99), 752 So.2d 771, 784 ("Notably, trial counsel neither disputed the explanations of inattentiveness given by the prosecutor nor developed a record of evidence contradicting those explanations."). This can be taken to mean that, in defense counsel's view, Mr. Brooks looked no more nervous than any other panelist and was not unusually nervous-looking. The State did not respond to the challenge of its proffered reason by providing examples of Mr. Brooks's alleged nervousness, or by making a comparison of his alleged nervousness to the demeanor of other panelists that the State found acceptable. While it is true that the ultimate burden of persuasion on the *Batson* challenge remained with defendant, the State made no effort to demonstrate that its motivation for the strike was benign, or to develop a record of objective support for its characterization. This reason proffered by the State, the ensuing comment by defense counsel, and the State's lack of further justification highlight the difficulties faced by reviewing courts when the trial court does not state its firsthand observations for the record.

Without the independent assessment from the trial court verifying the accuracy of the State's generalized and conclusory characterization, the record contains no objective support for the State's demeanor-based justification. In fact, the record seems to indicate that Mr. Brooks was an engaged and voluble juror throughout voir dire examination. For example, Mr. Brooks asked defense counsel to explain the apparent contradiction between the presumption of innocence and the rule requiring a defendant to prove that he was legally insane at the time of the offense. With regard to another aspect of the presumption of innocence, a defendant's Fifth Amendment right to remain silent at trial, when defense counsel asked the panelists whether "anybody [can] think of a reason why a defendant might not testify," Mr. Brooks alone spoke up and volunteered that defendant "may say something to destroy his credibility by accident." Finally, when asked by defense counsel whether anyone on the panel had any experience with someone suffering from mental illness, Mr. Brooks explained, "I'm a future teacher, and I run into students who have different problems, retardation, things like that." Answers and interactions such as these are not the kind that reasonably might be expected of someone who looked "very nervous" and "very uncertain." In the absence of the trial court's independent and particularized assessment of Mr. Brooks's demeanor, a reviewing court can only look to the record, which seems to indicate a lack of nervousness and uncertainty on the part of Mr. Brooks. Consequently, the State's proffered race-neutral reasons for striking Mr. Brooks are called into question.

The majority, relying on the Court's admonition in *Collins* that reviewing courts should not improperly substitute their evaluations of the record for that of the

trial court, concludes that "nervousness cannot be shown from a cold transcript, which is why only the trial judge can evaluate the demeanor of the juror and why the judge's evaluation must be given much deference." Slip op. at 18. In this case, however, the trial judge allowed the State's peremptory challenge of Mr. Brooks without any explanation whatsoever. In contrast, the trial court in *Collins* specifically stated:

> With regard to 016 [the panelist at issue], the court, frankly, did not observe the demeanor of Ms. 016 that was complained of by the District Attorney; however, Ms. 016 was a youthful person, as was [a white male juror the prosecutor also dismissed by peremptory challenge]. And one or more prospective jurors also. The [c]ourt is prepared to give the District Attorney the benefit of the doubt as to Ms. 016.

Rice v. Collins, 546 U.S. 333, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006). Thus, the trial judge in *Collins* made particularized findings regarding the prosecutor's proffered reasons. The trial judge in the instant case made no comment regarding Mr. Brooks's demeanor or his opinion of the trustworthiness of the prosecutor's explanations, even when the defendant immediately challenged the prosecutor's characterization of Mr. Brooks's demeanor. It is true that he allowed the peremptory challenge, but we are left with nothing but conjecture regarding his reasoning in the face of contrary characterizations of Mr. Brooks's demeanor by the State and the defendant. In my view, it is this lack of particularized reasons under these circumstances that distinguishes this case from *Collins.*

The credibility of the State's proffered reasons is called further into question when the strike of Mr. Brooks

is compared with the State's treatment of panelists who expressed similar concerns that could have caused them to vote in a way to shorten the trial if selected as a juror. After Mr. Brooks was excused, the fifth panel of prospective jurors included Michael David Sandras, a white teacher at University of New Orleans. In response to defense counsel questions related to whether any panelist had any personal reasons or pre-existing obligations that would make it difficult to serve on the jury or to concentrate during the trial, Mr. Sandras stated that the semester had just started the day before and that "any prolonged absence . . . becomes a real problem." Mr. Sandras further conceded that he might have trouble concentrating on the trial "to some extent" because he was "responsible as far as the students, obviously, and I'd have to somehow pass on the information concerning work." The State did not attempt to explore Mr. Sandras's concerns by asking followup questions. Instead, the State accepted Mr. Sandras as a juror, who was then peremptorily challenged by the defense. That the defense peremptorily struck Mr. Sandras so that he did not serve on the jury is of no moment because the defense did not make the decision to strike him until after the State made the decision to accept him. *See Miller-El,* 545 U.S. at 245, 125 S.Ct. at 2328 n.4 ("The fact that Witt and other venire members discussed here were peremptorily struck by the defense is not relevant to our point. For each of them, the defense did not make a decision to exercise a peremptory until after the prosecution decided whether to accept or reject, so each was accepted by the prosecution before being ultimately struck by the defense. And the underlying question is not what the defense thought about these jurors but whether the State was concerned about [their] views . . . when the venireperson was not black."). The State's complete lack of

concern regarding Mr. Sandras's expressed worries about neglecting his teaching duties if he were selected to serve on the jury and its ultimate acceptance of him as a juror seem to indicate that its proffered reason for striking Mr. Brooks was pretextual and that it struck him because of his race.

Similarly, in response to the same questioning by defense counsel, Mr. Arthur Yeager, Jr., a white retired engineer, stated that he had "a longstanding commitment to an event that's going to take place on Sunday that I've been an integral part of for many years." Defense counsel informed Mr. Yeager that they should be finished by then. Mr. Yeager seemed to be appeased and stated he could make the necessary arrangements with a few telephone calls "and take care of my animals, too." The State asked no additional questions related to Mr. Yeager's concerns, and, along with the defense, accepted him as a juror.

In my view, the acknowledged time concerns of Mr. Sandras and Mr. Yaeger seem equally significant as the time concerns attributed to Mr. Brooks. The majority discounts the similarities among these potential jurors by pointing out that Mr. Brooks initiated the discussions regarding his concerns about missing his obligations, while Mr. Sandras and Mr. Yeager merely responded to questions. However, in no instance did the State question Mr. Sandras or Mr. Yeager about their admitted concern regarding the time they would spend in court, and away from their personal activities, if selected to serve on the jury. The State chose to strike only Mr. Brooks, in part because of his stated concerns about missing a portion of his student teaching duties. The similarities among Mr. Brooks, Mr. Sandras, and Mr. Yaeger, and the State's uneven treatment of these panelists does not make the

State's proffered reasons for striking Mr. Brooks *per se* pretextual. Both Mr. Sandras and Mr. Yaeger may have exhibited legitimate traits and qualities that made the State believe they would make more desirable jurors than Mr. Brooks. *See Juniors,* 03-2425 at p. 31, 915 So.2d at 317-18; *State v. Collier,* 553 So.2d 815, 822 (La.1989). The factor that calls the State's strike of Mr. Brooks into question is the total lack of interest prosecutors exhibited in the admitted time concerns of Mr. Brooks, Mr. Sandras and Mr. Yaeger until it needed to justify with race-neutral reasons its strike of Mr. Brooks.

Miller-El directs that appellate courts cumulate all relevant items tending to point to purposeful discrimination and view them together when considering whether the trial court's determination of the existence of purposeful discrimination is clearly erroneous. The record shows that issues of racial prejudice existed at the outset of this case when defendant attempted to foreclose the possibility of the State mentioning the O.J. Simpson trial during his own trial. Defendant was tried by an all-white jury after the State used five of its peremptory strikes to challenge 100 percent of the eligible African-American panelists. In the absence of the trial court's independent and objective assessment on the record of Mr. Brooks's demeanor and attitude, the record tends to belie the prosecutor's stated race-neutral reasons for striking him. Rather than seeming uncertain and nervous, Mr. Brooks appears from a reading of the cold transcript to be engaged, forthcoming and communicative. Additionally, although the State offered the fact that Mr. Brooks might want to manipulate his deliberation to cut the trial short because of his stated concerns about missing his student teacher duties as a race-neutral reason for its strike, the State did not ask Mr.

Brooks one question regarding this concern. Moreover, the State accepted without question on the issue at least two panelists who voiced similar concerns and might conceivably have the same motivation for cutting the trial short. Finally, we note that the State injected race into the proceedings directly when it did, in fact, mention the O.J. Simpson case during its penalty phase argument over the defendant's objection.

When viewed in isolation, perhaps none of the factors above would constitute enough evidence to overturn the trial court's determination in light of the great deference afforded its factual determinations. However, the totality of the evidence discussed herein, combined with the lack of the trial court's active participation in voir dire and its failure to articulate particularized reasons for its determination that the State's proffered reasons were not pretextual, leads to the conclusion that the trial court's decision to allow the strike of Mr. Brooks was clearly erroneous. In my view, the cumulative evidence of pretext is compelling and too powerful to conclude anything but intentional racial discrimination motivated the State's strike of Mr. Brooks. Consequently, I would reverse defendant's conviction and sentence.

JOHNSON, Justice, dissenting and assigning reasons:

When this case was first before this court on original review in *Snyder I,* 98-1078 (La.04/14/99); 750 So.2d 832, I stated:

> I would have more confidence in the fair-mindedness of this jury and the jury's pronouncement of the death sentence, had the state not used its peremptory challenges to exclude

every African American juror, resulting in an all white jury for this black defendant. In my view, this violation of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), coupled with the prosecutor's inflammatory and prejudicial comparison of this case to the O.J. Simpson trial, require that we set aside the death sentence and remand the case for resentencing.

The Sixth Amendment to the United States Constitution gives a criminal defendant the right to a trial by a jury of his peers. I still believe that racial discrimination in the jury selection process offends the Equal Protection Clause of the Fourteenth Amendment and a pattern of strikes against African American jurors still gives rise to an inference of discrimination. Once the inference of discrimination is present, the prosecutor then has the burden of articulating a race-neutral explanation for striking the African American jurors. The trial judge serves as the gatekeeper, ensuring that racial prejudice, which impedes the securing of equal justice, does not invade our judicial system. As the gatekeeper, the trial judge must decide whether the prosecutor has articulated a genuine concern, or whether the reason articulated is merely a guise to accomplish his/her discriminatory purpose. Verbalized facially neutral reasons can be a pretext for conscious or unconscious racism.

In the present case, the prosecutor's action in accepting the first African-American juror seems to have been a tactic to keep defense counsel from raising *Batson* challenges to the subsequent exclusions. Nonetheless, defense counsel noted in the record which excluded jurors were African-American. The *Batson* challenges to the

remaining three African-American jurors, including the one juror who was accepted and later backstruck, were overruled by the trial court. The trial court accepted the prosecutor's "race-neutral" explanations and the majority found them to be "plausible, supported by the record and race neutral."

The prosecutor's discriminatory intent in excluding all African-Americans from the jury was evidenced by his reference to the O.J. Simpson trial during closing arguments. In *State v. Green*, 94-0887 (La.5/22/95), 655 So.2d 272, 287, we recognized that "for a *Batson* challenge to succeed, it is not enough that a racially discriminatory result be evidenced; rather, that result 'must ultimately be traced to a racially discriminatory purpose.'" Here we have a racially discriminatory result. An all-white jury selected by peremptorily excluding the five African-Americans from the venire, and the prosecutor's racially discriminatory purpose of inflaming the jury by referring to O.J. Simpson getting away with murder in California.

Because of the nationwide media focus on O.J. Simpson, the defense made a pre-trial motion to exclude any references to the O.J. Simpson case. This motion was denied by the trial judge based on the prosecutor's assurance that he would not, at any time during the course of taking evidence or before the jury, mention the O.J. Simpson case. It is blatantly clear that the prosecutor did not intend to keep his word. The prosecutor had no need to make reference to this defendant not getting away with murder during the penalty phase of the trial. At this point, the defendant had already been convicted of the crime, so there was nothing for him to "get away

with." The prosecutor utilized the O.J. Simpson verdict to racially inflame the jury's passion to sentence this defendant to death. Such tactics leave no doubt in my mind that the prosecutor had a racially discriminatory purpose for excluding the African-American jurors.

During the hearing on the pre-trial motion to exclude references to the O.J. Simpson case, the following colloquy occurred:

Prosecutor:

Now, certainly, I can assure the Court that I'm not going to get up in my opening voir dire and say, "we're here for the Jefferson Parish O.J. Simpson court-case." I have no intentions of doing that. I have no – perhaps in argument, I don't know. I don't know. It might be inappropriate, but I think it's premature. And I can assure this Court I will make no reference to the O.J. Simpson case at any time during the course of the taking of any evidence in this case.

Defense Attorney:

That's – Judge, evidence is not what I'm worried about. I'm certain he's not going to ask any witnesses, "don't you think this is a whole lot like the O.J. Simpson case?" I'm concerned about Mr. Williams' famous arguments.

. . . .

Defense Attorney:

And I would ask that the court issue a ruling that Mr. Williams is not to refer to this or to make comparisons in any way with the O.J. Simpson case and that he be held in contempt if he does that.

Prosecutor:

Judge, I ask the court to allow me, as an officer of this Court, to conduct this case in the proper manner, but in the way that I see fit. And, I have given the Court my word that I will not, at any time during the course of the taking of evidence or before the jury in this case, mention the O.J. Simpson case. . . . So, I have-I give the Court my word that I won't do this. I just ask you not to grant this motion.

. . . .

The Court:

Based on Mr. Williams' representations, I'm going to deny your motion.

The defense argues that the prosecutor's comments on the O.J. Simpson verdict to this all white jury were devastating and requires that the conviction be reversed. While there is much evidence that the majority of white Americans believed O.J. Simpson was guilty of murdering his wife and that he "got away with it," the prosecutor's improper comments during the penalty phase do not implicate the trial phase.

The defendant's own confession, plus the testimony of his ex-wife, Mary Snyder who survived this brutal attack, along with that of Gwen Williams, the witness who came to the aid of Ms. Snyder during the attack, support the defendant's conviction of first degree murder. The prosecutor's improper and clearly inflammatory comments did, however, create a substantial risk that the death penalty would be imposed. In my opinion, the defendant's death sentence should

be set aside and this matter remanded for re-sentencing.

The United States Supreme Court granted defendant's writ of habeas corpus, vacated the judgment of this court and remanded the case to the Court to reconsider defendant's *Batson* claims in light of its recent opinion in *Miller-El v. Dretke,* 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). In *Miller-El,* the Supreme Court reaffirmed its position that racial discrimination by any state in jury selection offends the Equal Protection Clause of the 14th Amendment to the United States Constitution. This rule is meant to ferret out discrimination from our judicial system.

In this case, the majority's opinion concludes that although the prosecution is required by *Batson* to give race neutral reasons for a peremptory challenge, the race neutral reasons need not be *persuasive* or even *plausible.* The trial court need only find the prosecution's race neutral explanations to be *credible.* They conclude that the burden of proof never shifts from the defendant who must prove the State's discriminatory intent.

The difficulty for trial courts has always been separating out reasons that are legitimate, from those that are merely pre-textual. *Miller-El* suggests some tools to use in determining whether the proffered race neutral reasons are pre-textual. First, we should look at the number. In *Miller-El,* out of twenty (20) black members included in the one-hundred and eight (108) person venire panel, only one (1) actually served as a juror. Here, nine (9) of the eighty-five (85) prospective jurors were black. Four (4) were dismissed for cause and five (5) were removed by the State with peremptory challenges. One of the two alternate jurors was

black, but she did not participate in the jury's deliberations.

Secondly, *Miller-El* suggests we must do a side-by-side comparison of the black jurors who were struck and the white jurors who were allowed to serve. Any patterns of disparate treatment or questioning with regard to the death penalty should lead to the conclusion that the questioning was intended to exclude black venire members, despite any race neutral reasons proffered to the contrary. The trial court's job is to determine whether the reasons are credible, or even plausible.

Next, *Miller-El* suggests that we go beyond the comparisons to look at broader patterns of discriminatory practices during the jury selection process. In *Miller-El,* the Court concluded that the first clue to the prosecutor's discriminatory intent could be found in their resort during voir dire to a procedure known in Texas as the "jury shuffle." The record showed that the Dallas County District Attorney's Office used the jury shuffle to manipulate the racial composition of the jury and avoid reaching prospective black panel members.

Louisiana does not have the "jury shuffle," but we do have a practice that can be used in an equally discriminatory fashion. Louisiana allows parties to use peremptory challenges to "back strike" jurors pursuant to LSA-C.Cr.P. art 795.[1] In *State v. Plaisance,* 00-1858 (La.App.4Cir. 3/6/02) *rehearing denied,* 811 So.2d 1172, the Fourth Circuit concluded that the trial court's error in not allowing back

[1] Back striking refers to a party's exercise of a peremptory challenge to strike or excuse a prospective juror after initially accepting him, but prior to the final swearing of the jury panel.

strikes and the method employed in exercising challenges was harmless; the guilty verdict rendered was unattributable to the errors. In *State v. Watts,* 579 So.2d 931 (La.1991), the Court granted a writ of certiorari with an order stating: "A juror temporarily accepted and sworn in accordance with LSA-C.Cr.P. Art. 788 may nevertheless be challenged peremptorily prior to the swearing of the jury panel in accordance with LSA-C.Cr.P. Art. 790. LSA-C.Cr.P. Art. 795(B)(1)." *See also State v. Taylor,* 93-2201 (La.2/28/96), 669 So.2d 364, 376 ("peremptory challenges are exercisable at any time before the jury panel is sworn,") citing LSA-C.Cr.P. arts. 788, 790, 795(B)(1).

In this case, the State used its seventh peremptory challenge to back strike Jeffery Brooks, who had initially been accepted in the first panel of prospective jurors called for examination. Upon the defense's *Batson*'s challenge to the State's later backstrike of Mr. Brooks, the State responded that Mr. Brooks was very uncertain, and "looked nervous to me throughout the questioning," and that Mr. Brooks's concern about missing class as a student teacher might lead him "to go home quickly, come back with guilty of a lesser verdict so there would not be a penalty phase." The trial court allowed the peremptory challenges without a ruling as to whether the State's explanation was race-neutral or credible.

The *Batson* violations herein resulted in the defendant being denied his right to be tried by a jury of his peers. In *Snyder I,* I was of the opinion that these *Batson* violations required a setting aside of the death penalty, but not the conviction (guilt phase), since the evidence seemed to be persuasive. Now, I am of the opinion that these flagrant *Batson* violations require that the defendant's conviction and sentence must be set aside, and the

case remanded for a new trial. The defendant in a capital case is entitled under the Sixth and Fourteenth Amendments to an impartial jury in both the guilt and the penalty phase. *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 191 L.Ed.2d 492 (1992).

For the aforementioned reasons, I respectfully, dissent.

Supreme Court of the United States
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Washington, DC 20543-0001

William K. Suter
Clerk of the Court
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June 25, 2007

Ms. Marcia A. Widder
The Capital Appeals Project
636 Baronne Street
New Orleans, LA 70113

RE: Allen Snyder
v. Louisiana
No. 06-10119

Dear Ms. Widder:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

184C 65

(5)

No. 06-10119

FILED
SEP 5 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

ALLEN SNYDER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Louisiana

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QUESTION PRESENTED

Whether the Louisiana Supreme Court misapplied *Miller-El v. Dretke*, 545 U.S. 231 (2005), in rejecting Petitioner's claim that the prosecution struck African Americans on the basis of their race, where the prosecution struck all five qualified black panelists; provided reasons for two of its strikes which were not supported by the record, were not the subject of the prosecution's questions, and were shared by white panelists the prosecution accepted; and, in closing argument at the penalty phase, urged the all-white jury to sentence Petitioner to death because this case was "very, very, very similar" to the O. J. Simpson case, where Simpson "got away with it."

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS

The caption of the case contains the names of all parties in the lower courts and here.

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OPINIONS BELOW

The Louisiana Supreme Court's opinion in *State v. Snyder*, 750 So. 2d 832 (La. 1999) (*Snyder I*), appears in the Joint Appendix (JA) at 668. The Court's opinion following a remand to the trial court regarding Snyder's competency for trial, *State v. Snyder*, 874 So. 2d 739 (La. 2004) (*Snyder II*), is at JA 742. This Court's order vacating the judgment and remanding the case is at JA 757. The opinion of the Louisiana Supreme Court following remand from this Court, *State v. Snyder*, 942 So. 2d 484 (La. 2006) (*Snyder III*), is at JA 759.

JURISDICTIONAL STATEMENT

The judgment of the Louisiana Supreme Court was entered on September 6, 2006, and rehearing was denied on December 15, 2006. The petition for a writ of *certiorari* was filed on March 14, 2006, and granted on June 25, 2007. The Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ." It also involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Allen Snyder, an African American, was sentenced to death by an all-white jury in Jefferson Parish, Louisiana in August 1996. The trial occurred less than a year after the acquittal of O. J. Simpson on October 3, 1995 in the "trial of the century," which divided the country along racial lines with regard to the criminal justice system.[1] Prior to Snyder's trial, the lead prosecutor, James Williams, made public comments referring to this case as his "O. J. Simpson case." This prompted defense counsel to move to prohibit Williams from comparing this case to the Simpson case in the media and before the jury. Williams promised the trial judge, as an "officer of the court," that he would make no references to the O. J. Simpson case before the jury.

Five of the thirty-six prospective jurors from which the jury was selected were African Americans. Prosecutor Williams used his peremptory strikes to prevent all five from serving on the jury. The trial court rejected challenges pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1996), made at the time the last three jurors were struck. In his rebuttal argument at the penalty phase of the trial, Williams broke his promise and argued to the all-white jury that the case was "very, very, very similar" to the O. J. Simpson case, where Simpson "got away with it." JA 607.

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[1] *See, e.g.*, Alex Rodriguez, *A City's Silence Turns Into Joy and Disbelief*, Chicago Sun-Times, Oct. 4, 1995 (reporting that "[r]eaction to the verdict ran the gamut of emotion, from elation to disappointment to anger" in "the most closely watched murder trial in the nation's history"); Leonard Greene, *Racism Is Still the Hot Coal the Nation Refuses to Touch*, Boston Herald, Oct. 2, 1995, at 4 (describing the case as "one of the most racially divisive trials of our history"). *See also infra* notes 40-42.

Snyder raised the *Batson* issue in a motion for new trial, arguing that the prosecutor, knowing that it would be difficult to obtain the death penalty for Snyder, "maneuvered the jury around to where it was all white" in order to have a receptive audience for his O. J. Simpson argument. JA 659. The trial court denied the motion. JA 665.

The trial occurred in a community familiar with racial divisions and appeals to race. Less than six years earlier, white supremacist David Duke, a former grand wizard of the Knights of the Ku Klux Klan,[2] carried Jefferson Parish in primaries for the United States Senate[3] and governor of Louisiana,[4] and completed a term representing a district

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[2] *See* Tyler Bridges, The Rise of David Duke 35-65, 111-38 (1994).

[3] *See* Leonard Zeskind, Op-Ed, *For Duke, Just a Start?* N.Y. Times, op. ed., Oct. 9, 1990, at A25 (observing that in the racially polarized election, Duke carried "Jefferson parish – one of the wealthiest and best educated in the state" in making a strong showing state-wide that was "a significant victory for white supremacists"); Louisiana Secretary of State, *Election Returns by Parish – Official Results for Election Date 10/06/90 U.S. Senator*, http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmp&rqsdta=10069014012601 (last visited Aug. 31, 2007) (showing Duke received 52% of the vote in Jefferson Parish). Duke lost state-wide to Senator J. Bennett Johnston, who received enough votes in the primary to avoid a runoff. *Id.*

[4] Duke received 38% of the vote in Jefferson Parish in a field of twelve candidates in the primary for governor. Louisiana Secretary of State, *Election Returns by Parish – Official, Results for Election Date 10/19/91 Governor*, http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmp&rqsdta=10199110012919 (last visited Aug. 31, 2007). Duke received over 40% of the vote in Jefferson Parish in losing the runoff for governor. Louisiana Secretary of State, *Election Results by Parish – Official, Results for Election Date: 11/16/91 Governor*, http://www400.sos.louisiana.gov:8090/cgibin/?rqstyp=elcmp&rqsdta=11169110012919 (last visited, Aug. 31, 2007); Tyler Bridges, *supra* note 2, at 236.

in Jefferson Parish in the Louisiana House of Representatives.[5]

A. The Crime

Although Snyder was clearly responsible for the death of Howard Wilson, neither the circumstances of the crime nor the background of Allen Snyder made the death penalty a likely outcome in this case.[6] The Louisiana Supreme Court described the crime and the events leading to it in *Snyder I*:

> Defendant, Allen Snyder, and his wife, Mary Snyder, were having marital difficulties in the summer of 1995. Towards the end of their relationship, neither partner remained entirely faithful to the other. After several incidents of physical abuse at the hands of her husband, Mary Snyder took their children and went to live

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[5] Duke was elected to the Louisiana House of Representatives from Jefferson Parish District 81 in 1989, despite the support of Presidents Ronald Reagan and George H. W. Bush for his opponent. Tyler Bridges, *supra* note 2 at 152-53.

[6] The death penalty is to be imposed only upon the most culpable offenders who commit the most heinous crimes. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring); *Lowenfield v. Phelps*, 484 U.S. 231 (1988). Snyder, 34 at the time of the crime, had held a responsible job, supported his family and served his country, spending four years in the United States Marine Corps and receiving an honorable discharge. JA 724; R. 1412. Unlike many defendants facing the death penalty, he did not have a long record of crimes. He had no juvenile record and had successfully completed probation for his only adult conviction, possession of cocaine with intent to distribute in 1989. JA 726. The crime in this case was the product of jealousy and depression. Thus, the jury faced a formidable task in deciding whether Snyder should be sentenced to death or life imprisonment without the possibility of parole.

> with her mother. Despite this separation, defendant contacted Mary one evening in mid-August and the two discussed the possibility of getting back together. Mary agreed to meet defendant the following day to discuss a reconciliation. Defendant was anxious to meet with Mary and wanted to see her that evening, but she put him off, telling him she "didn't want to see him" that night. Rec. vol. 6, p. 1267.
>
> Instead, Mary went out on a late night date with Howard Wilson, a married man she claimed she had recently met. Defendant repeatedly tried to page her during the evening, but Mary refused to respond. At the end of their date, at approximately 1:30 a.m. on August 16, 1995, Howard Wilson pulled his vehicle up to the home of Mary's mother to drop Mary off. Defendant walked up to the car, opened the driver's side door of the vehicle, and attacked both Howard Wilson and Mary Snyder with some sort of knife containing a double-edged blade. He inflicted nine wounds upon Howard Wilson and nineteen wounds upon Mary Snyder.

Snyder I, JA 669-70.

Howard Wilson died from his wounds; Mary Snyder survived. Allen Snyder returned to his home, barricaded himself inside and called the police twelve hours later, apparently suicidal. *Id.*; R. 1284. Police responding to the call found him curled up in a fetal position mumbling "they're coming to get me" over and over. R. 1162-68. Snyder subsequently gave a statement admitting to stabbing his wife and Wilson. JA 670-71; R. 1280-81; State's Exhibit 22 (transcript of statement).

At the time of the crime, Snyder was depressed and distraught over the dissolution of his marriage.[7] He and Mary Snyder had been married for eight years and they had three children. JA 726 (*Snyder I*). Snyder worked at the Conti Fleet Company, where he had risen through the ranks from laborer to salaried dispatcher. JA 726; R. 1256-57, 1412-14, 1448-50.

Snyder was indicted for the first degree murder of Howard Wilson. The State sought the death penalty based upon a single aggravating circumstance – that the offender knowingly created a risk of death or great bodily harm to more than one person. R. 196; *see also* La. C. Crim. P. Art. 905.4(A)(4).

B. Pretrial Motions Regarding the Prosecution's Comparisons of This Case to the O. J. Simpson Case

Upon hearing that the lead prosecutor, James Williams, was publicly referring to the case as "his O. J. Simpson case," JA 51-52, 56, 57b, defense counsel moved *in limine* "to preclude the state from making any reference or comparison whatever – direct or indirect – to other notorious prosecutions, specifically *People of the State of California v. Orenthal James Simpson.*" JA 48. Defense counsel argued in the written motion that references to the Simpson case were prejudicial and racially inflammatory, as "[s]urveys conducted since the verdicts in the O. J. Simpson trial have shown consistently that a large majority of

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[7] Snyder's depression created issues regarding his competency for trial, which were resolved in *Snyder II*, JA 742 (holding that Snyder, although on medication for depression, was competent for trial).

white Americans believe that the not guilty verdicts were wrong." JA 49.

At the hearing on the motion a week before the start of trial, defense counsel stated that "Mr. Williams has been all over two parishes talking about this is his O. J. Simpson case." JA 51. She noted that "[s]ixty-something percent of all white people in America think that O. J. Simpson got away with murder. We've got a ninety-five percent jury venire that is white." JA 52.[8]

Williams did not disavow that he had publicly compared this case to the O. J. Simpson case. Instead, he argued that granting the motion would invite "two dozen more motions seeking to keep me from saying a word during argument," JA 52, and promised to make no reference to the Simpson case during the taking of evidence. *Id.* Defense counsel replied that she was concerned "about Mr. Williams' famous arguments." JA 53.[9] Williams responded,

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[8] Counsel's representations were accurate. A USA Today/CNN/Gallup Poll found that "the verdict in the Simpson case has left white Americans bitter, cynical about the criminal justice system, and overwhelmingly convinced that race relations will worsen as a result." Joe Urschel, *A Nation More Divided,* USA Today, Oct. 9, 1995, at 5A. The poll also found that "[t]hree quarters of white Americans believe Simpson was guilty. Only one-quarter of blacks do." *Id.* These attitudes continued through and after the time of Snyder's trial. *See* Frank Newport & Sylvia Saad, *Civil Trial Didn't Alter Public's View of Simpson Case,* Gallop Poll Monthly, Feb. 1, 1997, at 21 ("Gallup polls conducted since Jul[y] 1994, show that whites and blacks remain divided over the guilt or innocence of actor and former football star OJ Simpson. . . . Whites . . . overwhelmingly believe that Simpson is guilty").

[9] Williams' "famous arguments" included two made in capital cases which the Louisiana Supreme Court reversed for improper closing argument. *See State v. Johnson*, 541 So. 2d 818 (La. 1989) (reversed for reference to defendant's failure to testify), La. S. Ct. No. 87-KA-2270, *Transcript of Rebuttal Argument of Mr. Jim Williams*, March 14, 1986,

(Continued on following page)

"[t]rust me, trust me[,]" and later asked "as an officer of this Court" to be allowed "to conduct this case in the proper manner" stating: "*I have given the Court my word that I will not*, at any time during the course of the taking of evidence or *before the jury in this case, mention the O. J. Simpson case.*" JA 53 (emphasis added). The trial court ruled: "Based on Mr. Williams' representations, I'm going to deny your motion." JA 54.

Defense counsel also moved for an order prohibiting Williams from continuing to make comments to the media comparing this case to the O. J. Simpson case. JA 55. In the written motion, defense counsel related a call received the day before trial was to begin in which "a reporter for WDSU-TV[ ] request[ed] comment on 'the O. J. Simpson trial' scheduled to begin the following day in Jefferson Parish," and "confirm[ed] that it was the District Attorney's Office which had billed this trial with the by-now infamous moniker, and intimated that it was the reference that made the story newsworthy." JA 56.

At the hearing on the motion on August 27, 1996, before the start of jury selection, Williams again did not deny comparing this case to the O. J. Simpson case. He responded that he was "a big First Amendment guy" and "this is yet another motion that if it's granted, is going to

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at 12 (transcript of Williams making the reference); *State v. Smith*, 554 So. 2d 676 (La. 1989) (reversed due to Williams' statement in argument that he had additional evidence of guilt not introduced, including statements from witnesses not called, that was consistent with testimony of witnesses who were called), La. S. Ct. No. 87-KA-0649, *Excerpt of Voir Dire, Opening Closing Argument, Closing Argument, Rebuttal Argument, Court's Charge to the Jury on the Trial on the Merits, and Bifurcated Hearing*, May 22, 1986, at 71-72 (transcript of Williams making the arguments).

bring about a tidal wave of other motions, trying to limit what I can and cannot do, and I don't think it's relevant in this case." JA 57a-57b. He concluded by saying, "Judge, I can assure you that I have no intention of speaking with the press while the case in chief is being tried. . . ." JA 57c. The trial court responded, "All right. With that in mind I'm going to go ahead and deny the motion." *Id.*

C. Jury Selection

After the court decided which persons summoned for jury duty should be excused for cause due to obligations or hardship, the remaining potential jurors were called in panels of thirteen to be questioned by the lawyers. (Seven jurors were added to one panel after seven were excused following initial questioning. JA 302-04.) The lawyers were allowed to give lengthy explanations of legal concepts,[10] to address their questions to individual jurors as well as the entire panel, and to question individual jurors at length.[11]

At the conclusion of the questioning of each panel, the court heard challenges for cause. The jurors remaining

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[10] *See, e.g.*, JA 171-81; 190-92, 193-96, 279-80, 361-64, 429-30.

[11] *See, e.g.*, JA 183-85 (series of questions to Dominick Bondi regarding his employment as police officer), 202 (series of questions to Brendan Burns about prior jury service), 285-87, 288-89 (questions to Mary Ann Calligan regarding her views on the death penalty), JA 308-09 (questions to Karen Davis about her attitudes on the death penalty), 310-11 (questions to Reubin Lottinger regarding ability to consider insanity defense), 312-15 (questions to Peter Licalli regarding ability to consider insanity defense), 376-78 (questions to Wilma Goff regarding prior jury service), 425-26 (questions to James Simoneaux regarding prior jury service), 453-54 (questions to Anna Reber about the death penalty), 459-61 (questions to John Donnes regarding ability to consider insanity defense).

after the court ruled on challenges for cause were considered one at a time for peremptory strikes. The prosecution first accepted or struck a juror. If the juror was accepted by the prosecution, the defense then accepted or struck the juror. Each party exercised twelve peremptory strikes. Upon the completion of strikes after the questioning of the sixth panel, both sides had used all of their strikes and the jury of twelve had been selected. *See* JA 547-50.[12]

Although African Americans made up approximately 20% of the population of Jefferson Parish in 1996,[13] nine – 10.6% – of the eighty-five prospective jurors questioned in the six panels were black. JA 804. Four were dismissed for cause. *Id.* The prosecution used peremptory strikes to remove the remaining five. *Id.*

1. The Questioning and Acceptance of Jeffrey Brooks

Jeffrey Brooks, a 26-year-old African American student at Southern University, was in the first panel of jurors questioned. At the beginning of voir dire, Brooks

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[12] A seventh panel was questioned for the purpose of selecting two alternates. JA 551-87. Each side had one additional strike for the selection of alternates. JA 586. One of the alternates, Jacqueline Woods, was African American. *Id.* Neither alternate was needed during trial.

[13] African Americans made up 17.6% of the population of Jefferson Parish in 1990, *see* 1990 U.S. Census, http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qr_name=DEC_1990_STF1_DP1&ds_name=DEC_1990_STF1_&geo_id=05000US22051 (last visited Aug. 31, 2007), and 22.9% of the population in 2000. *See* 2000 U.S. Census, http://factfinder.census.gov/servlet/SAFFFacts?geo_id=05000US22051&_state=04000US22&pctxt=cr (last visited Aug. 31, 2007).

had expressed concern that jury service might interfere with observation of a class as part of his preparation for student teaching. JA 102-04. Brooks gave the name of his dean to the trial judge's staff. The trial judge later informed Brooks that the dean had been contacted and the dean had said that jury service through the remainder of the week would not be a problem. JA 116.[14] Brooks replied, "Okay." *Id.* Neither the court nor the parties asked Brooks whether he had any further concerns about observing classes, and he did not express any.

Prosecutor Williams prefaced his first question to the first panel with an explanation of the case and the death penalty that covered fifteen pages of transcript. JA 171-81. He then asked each juror individually if he or she could impose the death penalty. Brooks answered, "Yes." JA 186-87. The prosecutor asked Brooks two other questions – whether he could consider the insanity defense, JA 193-97, and what verdict he would return if the prosecution proved its case beyond a reasonable doubt. JA 206-07. Brooks answered that he "would listen" to evidence of insanity. JA 197-208. In response to the second question, Brooks replied, "Guilty." JA 206.

In response to defense counsel's questions, Brooks answered that his brother was in the Army Reserve, JA 217; that in deciding whether to credit a police officer's testimony over the defendant's, he "would weigh what I heard," JA 223; and that he could presume Snyder innocent. JA 230. Brooks asked for clarification with regard to

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[14] The trial was not expected to go beyond the coming weekend, *see, e.g.*, JA 204 (prosecutor Williams tells jurors "we're hoping that this case will be over by the weekend, by Saturday at the latest"). It started on Tuesday, August 27 and ended on that Friday, August 30.

two questions and volunteered answers in response to two other questions posed by defense counsel to the panel as a whole.[15] At the conclusion of questioning of the first panel, both sides accepted Brooks for service on the jury. JA 268. The prosecutor would later backstrike Brooks after the questioning of the fourth panel. JA 443.[16]

2. The Strikes of Gregory Scott and Thomas Hawkins

The prosecutors struck the only black prospective juror in the second panel, Gregory Scott, an African American engineer with the utility company Entergy. JA 306. In response to the three questions the prosecutor asked him, he answered that he could consider the death penalty, JA 308; that his wife's car had been stolen at gunpoint, JA 322; and that he could consider the insanity defense. *Id.* When questioned by the defense, Scott answered that his brother had been in the Marines, JA 326;

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[15] In response to a question about whether anyone had any dealings with mental illness, Brooks said, "I'm a future teacher, and I run into students who have different problems, retardation, things like that." JA 236-37. Asked whether he could presume Snyder innocent, Brooks responded with a question about the burden of proof with regard to the insanity defense. JA 229-30. In answer to defense counsel's question, "Can anybody think of a reason why a defendant might not testify?" Brooks volunteered, "He may say something to destroy his credibility, by accident." JA 240. Asked whether he would hold it against Snyder if he asserted the insanity defense, JA 208-09, Brooks asked whether the defendant or his lawyer makes the decision to rely on the defense.

[16] Although peremptory strikes were made after the questioning of each panel, the parties were allowed to "backstrike" jurors who had been accepted by both sides after the voir dire of earlier panels. *See* La. C. Crim. P. Art. 795(B)(1); *State v. Taylor*, 669 So. 2d 364, 376 (La. 1996) (describing the practice).

that he could consider evidence of domestic abuse solely to show motive and intent, JA 328; and that he could consider a verdict of manslaughter, JA 338-39, and a sentence of life imprisonment. JA 342. Asked about the defendant's right not to testify, Scott answered that he would want to testify if innocent, but would "consider the advice of the lawyers." JA 334-35. The prosecution struck Scott. JA 345. The defense noted Scott's race, but did not make a *Batson* challenge. *Id.*

After the questioning of the third panel, the prosecution struck Thomas Hawkins, an African American ship foreman at Shell Oil Refinery, JA 355. Hawkins answered that he could consider both imposition of the death penalty and a life sentence, JA 358, 364; that many of his friends were police officers in Jefferson Parish, JA 380; that he had served in the Army from 1966 to 1968, JA 383; and that he could apply the burden of proof. JA 392. Although he appeared confused during the State's questioning regarding the difference between the burden of proof regarding insanity and simply considering an insanity defense, upon subsequent questioning he answered that he could consider the insanity defense and hold the defense to its burden of proof. JA 369-70, 379. Nevertheless, the prosecution struck Hawkins. JA 400. Again, defense counsel noted that he was black. *Id.*

3. The Strike of Elaine Scott and the *Batson* Challenge

The prosecution struck another black juror in the third panel, Elaine Scott, a finance clerk and the mother of two sons, ages 8 and 18, whose husband worked at AT & T. JA 356.

The prosecutor asked Ms. Scott three questions which she answered in seven words. In response to the prosecutor's question to each juror regarding his or her ability to impose the death penalty, Scott answered, "I think I could." JA 361. The prosecutor then began to question each juror individually about his or her ability to consider a sentence of life imprisonment, but by the time he got to Scott, the question appeared to be whether she could consider a death sentence. JA 361-67.[17] She responded, "I could." JA 367. Asked if she could hold the defense to its burden of proving insanity, she answered, "Yes." JA 371. Questioned by defense counsel, Scott answered that it was possible that a police officer might not testify truthfully, JA 383; that she could consider manslaughter, JA 390-91; that she would apply the burden of proof, JA 392; that she could consider mitigating circumstances, JA 396; and that she and her brother-in-law had been in the Army. JA 384. Asked whether she thought Snyder should "get up and tell you what happened," Scott answered, "It's his right." JA 387.

The prosecution struck Scott. JA 401. Defense counsel objected pursuant to *Batson v. Kentucky*, noting that she

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[17] The prosecutor asked jurors individually whether they could consider life imprisonment, but before getting to Scott, the prosecutor, instead of questioning one juror, noted that previously the juror had said she could not consider the death penalty, and then called upon the next juror saying only, "Ms. Goff?" R. 367. Ms. Goff responded, "I could consider the death penalty." *Id.* The prosecutor responded, "You could consider both?" and Ms. Goff answered, "Yes, I would consider it." *Id.* The next four jurors, including Ms. Scott, responded that they could consider "it." *Id.* Depending upon how she understood the question, Ms. Scott responded, like the four jurors before her, that she could consider either life imprisonment or death.

was the third African American struck[18] and argued that "there has been a pattern." *Id.* The prosecutors responded that Scott was "very weak on her ability to consider the imposition of the death penalty," *id.*, and "very positive" about a life sentence. JA 401-02. Defense counsel countered, "[t]his lady indicated that she could consider both." JA 402. The trial court overruled the objection, saying only, "All right. I'm going to go ahead and allow the [peremptory] challenge." *Id.*

4. The Strikes of Jeffrey Brooks and Loretta Walker

After the questioning of the prospective jurors in the fourth panel, the prosecution backstruck Jeffrey Brooks, JA 443, who had been accepted after questioning of the first panel. JA 268. The prosecutors also struck the only other African American in the fourth panel, Loretta Walker. JA 447-48. Defense counsel challenged both strikes pursuant to *Batson*.

Prosecutor Williams said that he struck Brooks because he "looked very nervous to me throughout his questioning" and, that because Brooks "was going to miss class" he might want "to go home quickly," and thus "come back with guilty of a lesser verdict so there wouldn't be a penalty phase." JA 444. Defense counsel countered that the trial court had dealt with any concerns Brooks had about missing class by informing him his dean had said

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[18] Jeffery Brooks, an African American who had been accepted after questioning of the first panel, JA 268, had not yet been struck. The prosecutor backstruck him after questioning of the fourth panel. JA 443.

that it would not be a problem, and that Brooks looked no more nervous than anyone else. JA 445. The trial court overruled the objection, stating only, "All right. I'm going to allow the [peremptory] challenge. I'm going to allow the challenge." *Id.*

Prosecutor Williams said his reason for striking Walker was that she could impose the death penalty only under limited circumstances. JA 447. In response to the prosecutor's questioning, Walker had indicated that she could impose the death penalty if "he did some real bad things" like "child molestation. Killing a child." JA 417. She was not asked what other "bad things" would warrant the death penalty. The trial court overruled the objection, stating: "All right. The Court is going to allow the [peremptory] challenge." JA 448.

D. The Prosecution's Comparison of Snyder to O. J. Simpson in Rebuttal Argument at the Penalty Phase

The jury returned a verdict of guilty of first degree murder. R. 1363, 1366. The sentencing phase of the trial began and ended on August 30. During rebuttal closing argument, prosecutor Williams said that defense counsel's argument about Snyder appearing suicidal when he was arrested, "[m]ade me think of another case, *the most famous murder case in the last, in probably recorded history, that all of you all are aware of* – " JA 606 (emphasis added). The defense objected. In a conference at the bench, Williams argued that Snyder "pretended to kill himself, just like O. J." and "that's fair comment on something that's common knowledge." JA 606-07. The trial court overruled the objection, saying only, "I'm going to allow it." JA 607. Williams resumed his argument:

> The most famous murder case, and all of you all have heard about it, happened in California *very, very, very similar to this case*. The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, *he got away with it*. Ladies and Gentlemen, is it outside the realm of possibility that that was what that man was thinking about when he called in and claimed that he was going to kill himself?

JA 607 (emphasis added). After two and a half hours of deliberations, the jury returned with a sentence of death. R. 1598.

E. The Motion for a New Trial

At the hearing on the motion for a new trial, defense counsel argued that because the prosecutor "had no earthly idea that he would get a death penalty in this case," JA 655, he "maneuvered the jury around to where it was all white," so that he could make the O. J. Simpson argument because "it's kind of hard to say things about a black defendant when there's one or two blacks on the jury." JA 659. The trial court denied the motion. JA 664-65. The court's only explanation for its *Batson* ruling was, "As to the *Batson* challenges, the Court believes that the D.A. explained sufficient race neutral reasons for his challenges." JA 665.

F. The Louisiana Supreme Court's Review on Appeal

The Louisiana Supreme Court affirmed the trial court's *Batson* rulings on appeal. In an opinion by Justice Kimball, the court held that "the State's proffered reasons [for the strikes] were plausible, supported by the record

and race-neutral." JA 777. Justices Lemmon and Johnson dissented. Justice Lemmon concluded that "the prosecutor's intention to utilize racial bias became crystal clear when he commented during closing argument in the penalty phase that O. J. Simpson 'got away with it.'" JA 733-32. Justice Johnson concluded, based on the prosecutor's resort to the Simpson case after promising the court he would not mention it, that "the prosecutor had a racially discriminatory purpose for excluding the African American jurors." *Id.* at 741.[19]

This Court vacated the judgment and remanded for reconsideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*). JA 757. On remand, the Louisiana Supreme Court again rejected the *Batson* claim, this time by a 4-3 vote. JA 759, 777-82 (*Snyder III*). The majority considered Snyder's *Batson* claim only in relation to the prosecution's strikes of Brooks and Elaine Scott because defense counsel had not lodged *Batson* objections to the earlier strikes of Gregory Scott and Hawkins,[20] and appellate counsel made "no argument with regard to Loretta Walker." JA 774. The majority quoted from Justice Kimball's original decision for the majority in *Snyder I*, JA 776-77, and again upheld the prosecutor's strikes, based

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[19] The court remanded the case to the trial court for a determination of whether Snyder had been competent during trial. JA 709-15, 731. In *Snyder II*, it affirmed a finding by the trial court that Snyder was competent at the time of trial. JA 742.

[20] Although petitioner included a question in his petition for *certiorari* regarding counsel's ineffectiveness in failing to ask for reasons for the strikes of Hawkins and G. Scott, this brief addresses only the *Batson* issue and presents no question of counsel's effectiveness.

upon its understanding of *Miller-El II*[21] and *Rice v. Collins*, 546 U.S. 333 (2006). JA 778-81. The majority reexamined and upheld the reasons for striking Brooks. The majority did not find that the prosecution's backstrike of Brooks, when compared to the acceptance of white prospective jurors, or the comparison of Snyder to O. J. Simpson were racially motivated, noting that the prosecutor did not mention the race of either Simpson or Snyder. JA 782-89.

Justice Kimball, the author of the majority opinion in *Snyder I*, joined by Chief Justice Calogero, dissented, finding that when reconsidered in light of *Miller-El II*, "the cumulative evidence of pretext is compelling and too powerful to conclude anything but intentional racial discrimination motivated the State's strike of Mr. Brooks." JA 799. Justice Johnson also dissented, concluding that reversal was required not only for the reasons stated in her dissent in *Snyder I*, but also because of the guidance provided by this Court in *Miller-El II*: consideration of the number of black jurors struck, the "side-by-side comparison" of black venire members who were struck and white venire members who were accepted by the prosecution, and the use of a backstrike through which the prosecutor masked his intent to strike African Americans by initially accepting Brooks, only to exclude him later. JA 804-06.

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[21] The majority characterized *Swain v. Alabama*, 380 U.S. 202 (1965), *Batson*, and *Miller-El II* as a "trilogy [that] presents a pendulous treatment by the Court of the issue of the evidentiary burden placed on a criminal defendant who claims that equal protection has been denied through the State's use of peremptory challenges to exclude individuals from the petit jury on the basis of race." JA 762. The majority explained that "in *Miller-El*, the Supreme Court moved the pendulum back toward middle ground," between *Swain* and *Batson*. JA 764.

The case is before this Court on writ of *certiorari* to review the decision of the Louisiana Supreme Court.

SUMMARY OF THE ARGUMENT

The dissenting justices on the Louisiana Supreme Court, based on a review of the entirety of the record and applying "the vigorous analysis" directed by this Court in *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*), JA 789, correctly found that the prosecution violated *Batson v. Kentucky*, 476 U.S. 79 (1986), in using five peremptory strikes to remove one hundred percent of the black prospective jurors. JA 789-807. The dissenting justices recognized the "backdrop of the issues of race and prejudice" against which the prosecution made its strikes, JA 790; found the State's proffered reasons for striking African Americans lacked record support and were not credible in light of the prosecution's acceptance of white prospective jurors sharing the characteristics of the blacks who were struck; and concluded that the prosecutor's use of "the O. J. Simpson verdict to racially inflame the jury's passion to sentence this defendant to death . . . leave[s] no doubt . . . that the prosecutor had a racially discriminatory purpose for excluding the African American jurors." JA 802 (Johnson, J., dissenting).

The justices in the majority did not consider together "the totality of the relevant facts," as required by *Batson*, 476 U.S. at 96. The majority also failed to recognize and properly consider indicia of discriminatory intent identified by this Court in *Miller-El II*, such as the prosecution's use of its strikes to exclude one hundred percent of the prospective black jurors, the prosecution's failure to question black prospective jurors with regard to the reasons it

asserted for striking them, and the acceptance by the prosecutors of white jurors who had the same characteristics as those the prosecutors asserted as their reasons for striking blacks.

The majority also failed to recognize the discriminatory motive behind prosecutor Williams' acceptance of Jeffrey Brooks in the fist panel, JA 268, only to backstrike him later, JA 443, after the defense did not make *Batson* objections to the prosecution's strikes of two black prospective jurors. The majority closed its eyes to reality in failing to find that Williams' references to the O. J. Simpson case before trial and in closing argument were indicative of his intent in striking all of the black prospective jurors. And it gave a degree of deference to the trial court's rulings that exceeded the plain error standard and allowed the discriminatory selection of jurors to go uncorrected.

The record does not support the prosecutors' claim of nonracial reasons for striking Jeffrey Brooks. The prosecutors said that they struck Brooks because he was "nervous" and would be so concerned about getting back to his classes that he would return a verdict of guilt of a lesser crime to avoid a penalty phase. JA 444. However, as Justice Kimball observed in her dissent, the prosecutors put nothing on the record to support their assertion of "nervousness" after it was challenged by defense counsel. Brooks was "an engaged and voluble juror throughout the voir dire examination." JA 794 (Kimball, J., dissenting). Brooks' concern about missing class was fully satisfied by the judge's assurance that Brooks' dean had said his absence for jury duty would not be a problem. JA 116.

Nor is there any support in the record of the few words spoken by Elaine Scott for the reasons given by the

prosecutors for striking her – that she was weak on the death penalty and strongly favored a sentence of life imprisonment. JA 401-02. Scott never expressed either of those sentiments. The prosecutors did not question Brooks and Scott about their reasons for striking them even though they had ample opportunity to do so. The prosecutors also accepted white prospective jurors sharing the characteristics that they had identified as the reasons for their strikes. This is compelling evidence of their discriminatory intent. *Miller-El II,* 545 U.S. at 241-52.

The proper application of *Batson* and *Miller-El II* to all of the circumstances of this case clearly establishes the prosecutors' discriminatory intent in striking black prospective jurors. Therefore, this Court should reverse the decision of the Louisiana Supreme Court and remand this case with instructions to grant relief pursuant to *Batson v. Kentucky*.

ARGUMENT

THE PROSECUTION OBTAINED AN ALL-WHITE JURY BY STRIKING AFRICAN AMERICANS ON THE BASIS OF THEIR RACE.

I. THE PROSECUTION STRUCK ONE HUNDRED PERCENT OF THE AFRICAN AMERICAN PROSPECTIVE JURORS.

After the trial court ruled upon strikes for cause, five of the thirty-six prospective jurors from which the jury was selected were black. The prosecutors struck all five of them. R. 804. Thus, the prosecutors used close to half of

their twelve peremptory challenges to strike one hundred percent of the qualified African Americans, and used their remaining seven peremptory challenges to strike 23% of the white prospective jurors (seven out of thirty-one).

A similar disparity in the exercise of strikes was one of the reasons this Court found a *Batson* violation in *Miller-El II*. At Miller-El's trial, "'[t]he prosecutors used their peremptory strikes to exclude 91% of the eligible African American venire members. . . . Happenstance is unlikely to produce this disparity.'" *Miller El II*, 545 U.S. at 241 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) (*Miller-El I*)). It is equally unlikely that happenstance produced the disparity in this case, as Justice Kimball observed in her dissenting opinion. JA 790.

The Louisiana Supreme Court did not take these remarkable statistics into account in its analysis. Instead, it found its "task eased by an initial winnowing out" of all but two of the black panelists, JA 774, concluding that it need not consider the strikes of the first two blacks struck because defense counsel did not object when they were struck, JA 774 & 774 n.13, and, on remand from this Court, appellate counsel for Snyder did not argue the validity of the prosecution's reasons for striking Loretta Walker. JA 773-74. However, while the defense did not ask for reasons for the first two strikes of blacks[22] and, as a

[22] As the Louisiana Supreme Court acknowledged, "[b]ecause the State had accepted Jeffrey Brooks in the first panel of prospective jurors, the strikes exercised against Greg Scott in the second panel and Hawkins in the third panel did not reveal any pattern of exclusions which might have supported an objection on *Batson* grounds." JA 774 n.13. Although defense counsel did not ask for reasons for the first two strikes upon asserting its *Batson* objection after a third African American was struck, prosecutor Olinde started to give reasons for

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result, the prosecution was not required to give reasons for the strikes at the second step of the *Batson* procedure,[23] defense counsel asserted a *Batson* claim after the strike of Elaine Scott because "there has been a pattern." JA 401. At that time the pattern was the strikes of three of four blacks considered; the prosecutors would later backstrike Brooks, JA 443, and strike one additional black prospective juror, JA 447-48, resulting in a pattern of five-for-five.

Miller-El II makes it clear that the prosecution's removal of all five black jurors was to be considered at step three of the *Batson* procedure,[24] where the Louisiana

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striking Hawkins, the second black person struck, but lead prosecutor Williams interrupted and stopped him, JA 403, as he did on another occasion when Olinde was going to give reasons for challenging a black juror excused for cause. JA 584-85.

[23] This Court adopted a three-step test in *Batson v. Kentucky* to determine whether a prosecutor intended to discriminate in using peremptory strikes. First, a defendant must make a *prima facie* showing that a peremptory challenge has been exercised on the basis of race. *Batson*, 476 U.S. at 96-97. Second, upon such a showing, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.* at 97-98. Third, the court must determine, in light of all the evidence, whether the defendant has shown purposeful discrimination. *Id.* at 98.

[24] In *Miller-El*, the Petitioner pressed his *Batson* claim on direct appeal with regard to seven of the ten black jurors struck; in habeas corpus proceedings, he pursued it as to six. *Miller-El II*, 545 U.S. at 286 (Thomas, J., dissenting). This Court ultimately found that the prosecutor had discriminated in striking two of those jurors. *See id.*, 545 U.S. at 252 n.11. It based its holding on the totality of the evidence including, as a significant factor, the "remarkable" disparity in the State's use of ten of its fourteen strikes to exclude ten of eleven African Americans. *Id.* at 240-41. *See also, e.g., Siler v. State*, 629 So. 2d 33, 37 (Ala. Crim. App. 1993), *cert. denied*, 1993 Ala. LEXIS 1306 (Ala. Oct. 29, 1993) (*Batson* violation found where the prosecution used eleven of its fifteen strikes to remove eleven of twelve blacks from jury venire and failed to offer a "clear, specific, and legitimate reason" for its strike of one juror).

Supreme Court was to engage in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Batson,* 476 U.S. at 93 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)). *See also Miller-El I*, 537 U.S. at 340 ("It goes without saying that [evidence at the third step of the *Batson* inquiry] includes the facts and circumstances that were adduced in support of the *prima facie* case."). The failure of the Louisiana Supreme Court majority to include the statistical disparity in the prosecution's strikes in its analysis was error.

II. THE LOUISIANA SUPREME COURT FAILED TO FOLLOW THIS COURT'S GUIDANCE IN *MILLER-EL II* IN ASSESSING THE PROSECUTORS' REASONS FOR THEIR STRIKES.

The analysis employed in *Miller-El II* involved scrutiny of the record to determine whether it supported the reasons given by the prosecution for its strikes, 545 U.S. at 244; whether the prosecution "engage[d] in any meaningful voir dire examination" of the jurors struck with regard to the reasons proffered for striking them, *id.* at 246 (quoting *Ex parte Travis,* 776 So. 2d 874, 881 (Ala. 2000)); whether the prosecution's reasons for striking them applied equally to white jurors who were not struck by the prosecution, *id.* at 241;[25] and whether there was manipulation of

[25] Comparisons of the prosecution's treatment of Brooks and Scott, two of the black prospective jurors struck, with its treatment of white jurors is much easier in this case than it was in *Miller-El II*. The voir dire in this case consisted of conclusory questions – usually answered with a few words – asked to eighty-five prospective jurors in a day and a half. In *Miller-El II*, this Court analyzed the extensive questioning of jurors over five weeks. *Id.* at 283 (Thomas, J. dissenting).

the process for racial purposes (the jury shuffle discussed in the *Miller-El* opinions; the backstrike in this case). *Id.* at 253-55. The Louisiana Supreme Court majority failed to follow this Court's guidance in *Miller-El II* in assessing those factors. Consideration of them, together with the other circumstances of this case, at *Batson*'s third step establishes that the prosecutors discriminated in striking Jeffrey Brooks and Elaine Scott.

A. The Prosecution's Reasons for Striking Jeffrey Brooks Are Not Supported by the Record and Are Belied By Its Questioning and Acceptance of White Jurors.

Both sides accepted Jeffrey Brooks after the questioning of the first panel of jurors. JA 268. After the questioning of the fourth panel, Prosecutor Williams used a backstrike to remove Brooks. JA 443. Brooks was the fourth African American struck. Williams gave two reasons for striking Brooks:

> . . . Number 1, the main reason is that he looked very nervous to me throughout the questioning. Number 2, he's one of the fellows that came up at the beginning and said he was going to miss class. He's a student teacher. My main concern is that for that reason, that being he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase. Those are my two reasons.
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> . . .

> . . . If this case goes to the jury on Friday and one of them gets back there and gets smart and thinks that if they come back guilty of second degree murder, they won't have to do a penalty phase. . . .

JA 444-45. Defense counsel countered, "His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school . . . and the Dean said that wouldn't be a problem. . . . As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous." JA 445. Prosecutor Olinde responded, "he was very uncertain and very nervous looking." *Id.* The trial court overruled the *Batson* objection, saying only, "All right. I'm going to allow the [peremptory] challenge. I'm going to allow the challenge." JA 445.

Brooks was surely no more nervous or uncertain when the prosecutors backstruck him after questioning of the fourth panel than when the prosecutors accepted him after questioning of the first panel. "[S]trikes based on vague references to attributes like demeanor 'are largely irrelevant to one's ability to serve as a juror and expose venirepersons to peremptory strikes for no real reason except for their race.'" *State v. McFadden*, 191 S.W.3d 648, 655 (Mo. 2006) (citation omitted).[26] As Justice Kimball observed,

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[26] *See also, e.g., Dorsey v. State*, 868 So. 2d 1192, 1199 (Fla. 2003) ("[T]he proponent of a strike based on nonverbal behavior may satisfy its burden of production of a race-neutral reason during the second step of the process . . . only if the behavior is observed by the trial court or otherwise has record support."); *Commonwealth v. Maldonado*, 788 N.E.2d 968, 973 (Mass. 2003) ("Challenges based on subjective data such as a juror's looks or gestures, or a party's 'gut' feeling should rarely be accepted as adequate because such explanations can easily be used as pretexts for discrimination."); *Beartusk v. State*, 6 P.3d 138, 143

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"the record contains no objective support" for the reason, but "tends to belie" it as Brooks appeared to be "an engaged and voluble juror throughout voir dire examination." JA 794; *see also* JA 798 (Brooks appeared "engaged, forthcoming and communicative").[27]

As Justice Kimball noted, the prosecution did not respond to defense counsel's assertion that nervousness was a universal characteristic of the prospective jurors "by making a comparison of [Brooks'] alleged nervousness to the demeanor of other panelists that the State found acceptable . . . [and] made no effort to demonstrate that its motivation for the strike was benign, or to develop a record of objective support for its characterization." JA 793. *Cf. State v. Hobley*, 752 So. 2d 771, 784 (La. 1999) (prosecution's reason upheld where defense counsel "neither disputed the explanations of inattentiveness given by the

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(Wyo. 2000) ("Purely subjective impressions of a juror's qualities alone without objective support cannot suffice; such rationales could too easily be used to mask discrimination." (citing *State v. Cruz*, 857 P.2d 1249, 1253 (Ariz. 1993)).

[27] Brooks provided thoughtful and well-reasoned responses to the questions he was asked. *See, e.g.*, JA 222-23 (when asked by defense counsel whether he conceivably could believe the testimony of Snyder over that of a police officer, he responded that he would "weigh what [he] heard."); JA 208 (in response to defense counsel's question about whether he would hold defense counsel's decision to enter an insanity plea against counsel and not Snyder, Brooks asked, "The final decision is his, isn't it?"); JA 229-30 (when asked whether he could accord Snyder the presumption of innocence, he asked how that fit with the earlier explanation that the defense bore the burden of proving insanity); JA 240 (when defense counsel asked the panel whether anyone could think of a reason that a defendant might not testify, Brooks volunteered, "[h]e may say something to destroy his credibility, by accident."). As Justice Kimball observed, "[a]nswers and interactions such as these are not the kind that reasonably might be expected of someone who looked 'very nervous' and 'very uncertain.'" JA 794.

prosecutor nor developed a record of evidence contradicting those explanations").[28]

In response to the trial court's initial inquiry as to whether any prospective jurors had other obligations that might interfere with serving on the jury, Brooks said that he was an education student at Southern University and had just begun two weeks of observation of teaching prior to his own student teaching. JA 102-03. He provided the court with the name of his dean and, a short time later, the trial judge told Brooks, "We talked to Doctor Tillman and he says he doesn't see a problem as long as it's just this week. . . . Okay?" JA 116. Brooks replied, "Okay." *Id.* Neither Brooks, the parties, nor the trial court raised his need to attend class again. The trial was not expected to last past the end of the week, and it did not.[29] There is no reason to believe that, once assured by the trial judge that his brief absence from school was not a problem, Brooks had *any* concern about "missing class."

"Had Mr. Brooks's concern about his student teaching commitments genuinely mattered to the State, it would seem to reason that the State would have questioned him about it to determine the extent of his concern." JA 792 (Kimball, J., dissenting) (citing *Miller-El II*, 545 U.S. at 246). Yet, "[n]o attempt was made by the State to verify its

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[28] The Louisiana Supreme Court majority found Brooks "articulate during the voir dire" but suggested that this confirmed the prosecution's fear that he might "get smart" during jury deliberation and return a verdict of a lesser offense to avoid a penalty phase. JA 781. Neither the majority nor the prosecution ever squared Brooks' alleged "nervousness" and "uncertainty" with his articulateness.

[29] The prosecutor repeatedly stated that he expected the trial to "be over by Saturday." JA 111; *see, e.g.*, JA 105, 121, 130, 204; R. 451. In fact, the trial concluded on Friday, August 30, 1996. JA 38.

hypothesis and develop an objective basis for the strike." JA 792 (citing *Miller-El II*, 545 U.S. at 250).

The Louisiana Supreme Court majority upheld the reasons given for striking Brooks, first citing Justice Kimball's opinion for the majority in *Snyder I*,[30] and then announcing that its review on remand "uncovered a factor favorable to the State[] . . . not mentioned in *Snyder I*." JA 778-79. That factor was the prosecution's "consistent[] inquir[y] of a potential juror whether or not his or her particular problem would prevent concentration on the evidence so as to impair the juror's decision-making task." JA 779. But this factor weighs against the prosecutors' reason for striking Brooks. The prosecutors did not even ask Brooks whether he had any concerns after he had been assured by the trial court that his dean had said that missing a few days of school would not be a problem. Nor

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[30] In *Snyder III*, the Louisiana Supreme Court quoted the following from its decision in *Snyder I*:

> Here, the trial court did not find that defendant had established purposeful discrimination and overruled the *Batson* objections. These rulings appear correct. Although not required by the caselaw, the State's proffered reasons were plausible, supported by the record and race-neutral. [Citations omitted.] The prosecutor's reasons constituted "legitimate" grounds for the exercise of a peremptory strike. [Citation omitted.] None of the reasons articulated by the State are readily associated with the suspect class that is alleged to be the object of the State's discriminatory use of peremptory challenges. Defendant, the opponent of the strikes, offered no facts or circumstances supporting an inference that the State exercised its strikes in a racially discriminatory manner. Therefore, the defendant's proof, when weighed against the prosecutor's offered race-neutral reasons, was not sufficient to prove the existence of discriminatory intent.

JA 777 (quoting *Snyder I*, JA 681, 750 So. 2d at 841-42).

did the prosecutors ask whether, if Brooks were to have such concerns, they might interfere with his ability to concentrate as a juror.

Prosecutor Williams could have asked Brooks the same question he asked a white juror, Ronald Laws, who explained that the week of jury service was "bad timing" for him because he was a self-employed contractor with two houses near completion, which needed to be finished because one owner was moving in "this weekend, the other next weekend," and, due to his wife's recent hysterectomy and because he had no family in the area, he was "running the kids back and forth to school." JA 129-30. Prosecutor Williams asked him whether, if he were "stuck on jury duty anyway for about three or four days, til the end of the week," it would cause Laws "such concern that [he] wouldn't be able to listen to the evidence in the case" or if he would try to make other arrangements as best he could. JA 130. Laws responded, "I'd have to make other arrangements as best I could." *Id.*

When the trial court told Laws that it would not excuse him, Laws replied, "Okay," JA 130 – the same response that Brooks gave when told that the dean of his program did not think jury service would be a problem. JA 116. Prosecutor Williams apparently had no worries that Laws might "get smart" and return a lesser verdict in order to get back to his livelihood and his children.[31] The prosecution accepted Laws and he was one of the twelve jurors selected to hear the case. JA 549-50.

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[31] The prosecutors never explained why they believed Brooks was more likely than any other prospective juror to "get smart" and violate his oath as a juror in order to get home early.

The prosecutors also accepted "with no evident reservations" other prospective jurors who actually expressed concerns like those they asserted for striking Brooks. *Miller-El II*, 545 U.S. at 244. The prosecutors accepted Arthur Yeager, a white man who sat as a juror, even though he was reluctant to serve because he had "a long-standing commitment to an event that's going to take place on Sunday that I've been an integral part of for many years." JA 468.

The prosecutors also accepted Michael Sandras, a white male, who taught at the University of New Orleans and expressed concern that his teaching responsibilities would cause him to have trouble concentrating. JA 467. Unlike Brooks who was going to observe class, Sandras was a university professor teaching students in a semester that had already started. *Id.* Unlike Brooks, who was not asked about any trouble concentrating and did not voice such concerns, Sandras expressed concern about concentrating. Nonetheless, the prosecution accepted Sandras, who was removed by defense counsel's peremptory strike.[32]

The prosecutors also accepted Brendan Burns, a single parent and the manager of a landscape maintenance company, who expressed concerns about responsibilities at work, caring for his two daughters, ages 14 and 17, as well as his 89-year-old grandparents. JA 104-05. The prosecutors also accepted John Donnes, who told the

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[32] The fact Sandras and other prospective jurors were struck by the defense is not relevant to the prosecution's motives in accepting them. Here, as in *Miller-El II*, "the defense did not make a decision to exercise a peremptory until after the prosecution decided whether to accept or reject, so each was accepted by the prosecution before being ultimately struck by the defense." *Miller-El II*, 545 U.S. at 245 n.4.

court that he was worried about "cancel[ing] too many things" including a "serious appointment" that would have to be postponed. JA 467-68. The defense struck them after they had been accepted by the prosecution. JA 268, 547.

The Louisiana Supreme Court distinguished the strike of Brooks from the acceptance of Yeager and Sandras based upon the fact that Yeager and Sandras "were employed and apparently already had established careers; Brooks, on the other hand, was attempting to complete his college courses in order to begin a career in teaching," JA 780-81, and found that Brooks was "truly concerned" because he "approached the bench on his own volition" while Yeager and Sandras merely responded to questions asked of their panels. JA 781.

But Brooks approached the bench – as did Ronald Laws and Brendan Burns – in response to the trial court's directive that jurors who had obligations that might interfere with jury service approach the bench and describe them. That Brooks came forward is indicative only of his responsiveness to the trial court's question. Brooks expressed no concerns after the trial court told him that his dean said missing a few days of class would not be a problem. On the other hand, Laws, Yeager, Sandras, Burns and Donnes actually expressed concerns about maintaining their businesses, taking care of their families, and meeting important appointments.

The State's proffered reasons for striking Brooks simply do not hold up when considered in light of the entire record. As in *Miller-El*, "[t]he whole of the *voir dire* testimony subject to consideration casts the prosecution's reasons for striking [Brooks] in an implausible light. Comparing his strike with the treatment of panel members

who expressed similar views supports a conclusion that race was significant in determining who was challenged and who was not." *Miller-El II*, 545 U.S. at 252.

B. The Prosecution's Reasons for Striking Elaine Scott Are Not Supported by the Record and Are Belied by Its Questioning and Acceptance of White Jurors.

The two prosecutors gave different reasons for striking Elaine Scott, neither of which is supported by the record. Prosecutor Williams stated, "I observed she was very weak on her ability to consider the imposition of the death penalty. . . . I wrote it down, that she thinks she could, and that's the reason for our challenge." JA 401. Prosecutor Olinde said, "My notes indicate she was very positive on when I said about a life sentence, she was very positive on her reason – her agreement that she could do that." JA 402. Defense counsel countered that she "indicated she could consider both. . . . She also said she could consider the death penalty." *Id.* The court overruled the *Batson* challenge, stating, "All right. I'm going to go ahead and allow the [peremptory] challenge." *Id.*

Scott did not express either of the sentiments attributed to her by the prosecutors. If the prosecutors had concerns about Scott's attitudes with regard to the death penalty or life imprisonment, they could have asked her more than one conclusory question about each one, but they did not do so.

After Scott and the other jurors in the third panel introduced themselves, JA 355-56, prosecutor Olinde asked each person in the panel if he or she could consider the imposition of the death penalty, eliciting initial responses

of one to five words. JA 358-61. Scott replied, "I think I could." JA 361. Prosecutor Olinde asked her no other questions about the death penalty, but proceeded to question the next prospective juror. *Id.* After asking all the prospective jurors if they could consider the death penalty, the prosecutor then asked each juror if he or she could consider mitigating circumstances and a sentence of life imprisonment. JA 361-66. However, before getting to Scott, the prosecutor's question changed from one about a life sentence to one about the death penalty:

The State:	Ms. Alvarez, you said that you could not impose the death penalty. Ms. Goff?
Ms. Goff:	I could consider the death penalty.
The Defense:	I'm sorry, I couldn't hear.
The State:	You could consider both?
Ms. Goff:	Yes, I would consider it.
The State:	Ms. DuBois?
Ms. DuBois:	I could consider it, yes.
The State:	Mr. Saracione?
Mr. Saracione:	I could consider it.
The State:	Mr. Saulino, sir?
Mr. Saulino:	I could consider it.
The State:	Ms. Scott.
Ms. Scott:	I could.

JA 367. The prosecutor's next and last question to Scott was whether she could hold the defense to its burden of proving insanity, to which she replied, "Yes." JA 371.

Defense counsel did not question Scott about the death penalty and touched upon a life sentence only tangentially, asking if she could "consider mitigating circumstances, you know, a person's upbringing or the kind of life that he led." JA 396. Scott answered, "Right." *Id.* (Other jurors in the third panel had answered questions with the single word "right" eight times before Scott gave it as a response. JA 371, 376, 385, 389, 394.) Except in answering that she and her brother-in-law had been in the Army, JA 384, Scott was equally concise in answering the other defense questions: "Yes." JA 383 (agreeing, as did eight other jurors in her panel, that a police officer might not testify truthfully); "It's his right." JA 387 (in answer to whether a defendant should testify); "I can." JA 390-91 (affirming that she could consider manslaughter); and "Yes." JA 392 (in answer to whether she would apply "that very serious standard of proof").

The few words spoken by Scott in answer to the conclusory questions asked by the lawyers do not support the reasons given by the prosecution for striking her. She did not say what the prosecutor claimed – that "she was very positive . . . about a life sentence." JA 402. Even if Scott had understood the prosecutor's second question to her to be about a life sentence instead of the death penalty, her answer – "I could" – was no different from that of at least six other prospective jurors in her panel who also said they "could." Prospective jurors DuBois, Saracione, and Saulino who answered "I could consider it" right before Scott answered "I could," JA 367,[33] were accepted by

[33] Saracione and Scott also gave the identical answer, "right," when asked if they could consider mitigating circumstances. JA 394, 396. Scott and Saulino also gave virtually identical answers when asked if

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the State. JA 401. DuBois and Saracione served on the jury. JA 28 (clerk's minutes, listing the twelve jurors who served). Saulino was removed by the defense with a peremptory challenge. JA 401. As in *Miller-El II*, the prosecutor "simply mischaracterized [Scott's] testimony," *Miller-El II*, 545 U.S. at 244, in representing that she enthusiastically endorsed a life sentence over the death penalty.

As with Brooks, the prosecutors did not follow up with any questions to Scott to clarify her attitudes with regard to either the death penalty or life imprisonment. They certainly could have asked those questions. The lawyers were allowed to question individual jurors at length, as they did at various points throughout the voir dire.[34] Prosecutor Williams could have questioned Scott as he questioned a white juror, Mary Calligan, who responded that she was "not really sure" she could impose the death penalty. JA 285. Williams questioned her for over three pages of transcript, JA 285-87, 288-89, until she finally answered, "it would be extremely hard for me to impose the death penalty." JA 289.

In light of the prosecution's failure to ask Scott even one follow-up question about her attitudes on the death penalty or life imprisonment, the prosecutors' reasons – that Scott was "very weak on her ability to consider the imposition of the death penalty" and "very positive" about a sentence of life imprisonment – are simply "unworthy of

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they would hold it against Snyder if he did not testify, Scott answering, "It's his right," and Saulino answering, "It's his right. It's the law" and "That is his right." JA 387.

[34] *See supra* note 11.

credence." *Miller-El II*, 545 U.S. at 241 (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000)).

C. The Backstrike of Brooks is Evidence of Discriminatory Intent.

The prosecution's tactic of accepting Brooks, the first black prospective juror, to lull the defense lawyers into not making a *Batson* challenge when it struck the next two black jurors, and then backstriking Brooks is evidence of intent to discriminate when considered with all of the other circumstances of this case. *See* JA 800 (Johnson, J., dissenting) (quoting her earlier dissent in *Snyder I*). The backstrike "can be used in an equally discriminatory fashion" as the jury shuffle used by prosecutors to discriminate in *Miller-El*.[35] *Id.* at 805. Justice Kimball found the backstrike of Brooks "suspicious" and those "suspicions . . . [were] not eased when the voir dire of Mr. Brooks is considered alone or when it is considered along with that of other panelists." JA 791 (Kimball, J., dissenting). She found the use of the backstrike part of the "cumulative evidence of pretext" that convinced her that the "trial court's decision to allow the strike of Mr. Brooks was clearly erroneous." JA 799.

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[35] *See Miller-El II*, 545 U.S. at 253-55 (describing the use of Texas' "jury shuffle," which allowed the prosecutor to have panels with significant numbers of African Americans at the front of the panel randomly rearranged so that these prospective jurors might be reseated at the back of the panel where they were less likely to be reached).

III. WILLIAMS' ARGUMENT BASED ON THE O. J. SIMPSON CASE IS INDICATIVE OF HIS DISCRIMINATORY INTENT IN STRIKING BLACK JURORS.

Having used his peremptory strikes to obtain an all-white jury, prosecutor Williams played the race card in closing argument at the penalty phase. The defense had seen it coming and moved before trial for an order prohibiting Williams from making any reference to the O. J. Simpson case before the jury. JA 48-54. Williams gave the court his word "as an officer of the court" that he would not mention the O. J. Simpson case. JA 53. And yet, in his rebuttal argument – the last words the jury heard from any lawyer – Williams invoked the "the most famous murder case in the last, in probably recorded history, that all of you all are aware of – " JA 606. The defense objected and, at a bench conference, said, "He's going to mention the O. J. Simpson trial." JA 606. Williams responded that the reference was "fair comment on something that's common knowledge." JA 607. The trial judge overruled the objection, saying only, "I'm going to allow it." *Id.*

Williams continued: "The most famous murder case, and all of you all have heard about it, happened in California very, very, very similar to this case." JA 607. He then argued that Snyder, before his arrest, "when he called in and claimed that he was going to kill himself," was imitating O. J. Simpson, who "got away with it." JA 607.[36] It was an argument that was much more likely to be

[36] Snyder could not possibly have pretended to be suicidal based on knowledge that O. J. Simpson had been acquitted after feigning suicide. Snyder's crime occurred on August 16, 1995, close to two months *before* the jury's verdict in the Simpson trial on October 3 of that year.

(Continued on following page)

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well received by white jurors than black jurors and probably would not have been made if any African Americans were on the jury. *See* JA 734 (Lemmon, J., dissenting) (finding "compelling" the question of "whether the prosecutor would have ranted about O. J.'s getting away with it if he had not backstruck the only black juror toward the end of voir dire").

Williams' invocation of the O. J. Simpson case in breach of his promise "as an officer of the court" is indicative of both his intent in striking African American jurors and the credibility of the reasons he proffered for striking them. The closing argument revealed beyond any question that neither Williams nor the reasons he gave for striking jurors were worthy of belief. The Louisiana Supreme Court majority erred in disregarding this evidence of Williams' discriminatory intent and his dishonesty.

Defense counsel filed two motions before trial seeking orders to prevent Williams from comparing Snyder's case to the O. J. Simpson case at trial and in the media. JA 48, 55. As the defense urged in both motions, the references were irrelevant, prejudicial, and racially divisive. JA 48-49, 55-56. In response to the motion for an order to keep him from mentioning the Simpson case before the jury, Williams beseeched the court, "[t]rust me, trust me[,]" and promised "as an officer of the court" that he would not "*before the jury in this case, mention the O. J. Simpson case.*" JA 53 (emphasis added). He reiterated, "I give the Court my word that I won't do this." *Id.* The trial court

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Moreover, as Justice Johnson pointed out in dissent, "At this point, the defendant had already been convicted of the crime, so there was nothing for him to 'get away with.'" JA 801 (Johnson, J., dissenting) (quoting her earlier dissenting opinion in *Snyder I*).

denied the motion "[b]ased on Mr. Williams' representations." JA 54.[37]

A majority of the Louisiana Supreme Court, after observing that Williams broke his promise, but not criticizing him for it, concluded that Williams' reference to the Simpson case was an appropriate response to defense counsel's closing argument regarding Snyder's suicidal behavior and did not indicate any racially discriminatory intent because neither the prosecutor's pretrial remarks[38] nor his penalty phase argument "referred to Simpson's or Snyder's race." JA 787.

Ignoring the racial implications of the O. J. Simpson case ignores the time and place of Snyder's trial.[39] The

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[37] The trial court also denied the defense motion to prohibit Williams from comparing this case to the Simpson case in the media after Williams told the court he had no intention of talking to the press during the case in chief. JA 57c.

[38] In considering the inferences that could be drawn from Williams' pretrial comments, JA 786-87, the majority did not address Williams' comments to the media or his remarks at the hearings on the defense motions which sought to prevent him from making further comparisons of Snyder's case with the Simpson case. JA 48-57d. Instead, it examined only Williams' comment that "the Simpson trial involved alleged domestic violence" made at a hearing on July 29, 1996, to address the admissibility of prior acts of domestic violence. JA 782.

[39] The Louisiana Supreme Court twice noted that evidence regarding the O. J. Simpson case was not part of the record. JA 783-84 n.19, 787. This is precisely why Williams should not have argued it. However, once Williams compared Snyder to O. J. Simpson, the justices of the Louisiana Supreme Court were not required to "be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (Frankfurter, J.) (plurality opinion). Four justices in *Snyder I* and *Snyder III* strongly disagreed with the majority's conclusion that the prosecutor's invocation of the Simpson case was race neutral. JA 790-91, 799 (Kimball, J., joined by Calogero, C. J., dissenting in *Snyder*

(Continued on following page)

trial occurred less than a year after Simpson's acquittal in the "trial of the century."[40] The deep divisions along racial lines over issues of race and fairness in the criminal justice system that resulted from the verdict, with many white people believing that Simpson "got away with it," were observed by commentators,[41] the media,[42] and public

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III); *id.* at 801 (Johnson, J., dissenting) (quoting her dissent in *Snyder I*); *id.* at 731-34 (Lemmon, J., dissenting in *Snyder I*).

[40] Nearly every major newspaper in the United States called Simpson's case "the trial of the century." *See, e.g.*, Sheryl Stolberg, *The Simpson Legacy: Just Under the Skin, Will We Ever Get Along?* L.A. Times, Oct. 10, 1995, §S, at 3; Saundra Torry, *The Verdict Is In: These Forecasters Didn't Fare Too Well*, Wash. Post, Oct. 9, 1995, at F7; *The Simpson Verdict*, N.Y. Times, Oct. 4, 1995, §A at 20 (editorial). At the time of Snyder's trial in August, 1996, two books about the case were best sellers. *See Best Sellers List*, N.Y. Times Book Review, Aug. 4, 1996, at 26 (listing among top-ten best selling non-fiction books, Vincent Bugliosi, Outrage: The Five Reasons Why O. J. Simpson Got Away with Murder (1996), and Christopher A. Darden, In Contempt (1996).

[41] *See, e.g.*, Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 Geo. Wash. L. Rev. 173, 173 (1996) ("Many African Americans believe that Simpson was prosecuted because he is black, while many white Americans believe that the jury acquitted Simpson because it was predominantly black. Both groups suspect that race negatively affects the judicial process, but they cannot agree on how it does so.").

[42] *See, e.g.*, Sheryl Stolberg, *supra* note 40. ("[S]omething just as insidious and destructive [as lunch counter boycotts, calling out the National Guard and city blocks 'in flames'] is occurring – a verbal riot of sorts, as people of all colors, but particularly blacks and whites, vent their elation and their frustration over the outcome of the 'Trial of the Century.' "); Paul Hefner, *Races Split over L.A. Police*, Times-Picayune, New Orleans, La., Oct. 4, 1995, at A2 ("Most white people were certain O. J. Simpson was guilty. Most African Americans believed him innocent. And neither could make sense of the other's point of view."); Cynthia Tucker, *Acts of Grace and Heroism in 1995*, Times-Picayune, Jan. 1, 1996, at B5 ("The reaction to the O. J. Simpson verdict suggested an America where whites and blacks view the same evidence and come to stunningly different conclusions, an America where justice is not blind but avowedly color-conscious.").

opinion polls.[43] Other courts have recognized the racial implications of invoking the O. J. Simpson case even in the absence of the other circumstances present in this case.[44] Moreover, prosecutor Williams' strikes of all the black prospective jurors insured that he made the argument to an all-white jury selected from a parish that had been carried by a white supremacist in primaries for the U.S. Senate and governor just a few years earlier[45] and had long been divided along racial lines over the policies of its chief law enforcement officer, its elected sheriff.[46]

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[43] *See supra* note 8.

[44] *See, e.g., DeFreitas v. State*, 701 So. 2d 593, 601 (Fla. App. 1997) (reversing conviction, *inter alia*, because prosecutor's comparison of defendant with O. J. Simpson in closing argument was inflammatory and appealed to the passions and prejudices of the jury); *State v. Thompson*, 578 N.W.2d 734, 743 (Minn. 1998) (holding that comparison of defendant with Simpson was prosecutorial misconduct).

[45] *See supra* notes 2-4 and accompanying text. Petitioner does not suggest that the extreme racial animus apparently felt by some members of the white community was shared by all. But the fact that hostility toward blacks was pronounced among some is also indicative of Williams' intent. He knew that by selecting an all-white jury there was a likelihood that his appeal to race would play on the resentments of at least some members of the jury. David Duke received approximately 40% of the vote when he carried the Jefferson Parish in primaries for senator and governor in 1990 and 1991. *See supra* notes 3 & 4. Approximately 20% of the population of Jefferson Parish is African American. *See supra* note 13. Thus, even a fair jury selection process would be likely to result in more people who voted for Duke than African Americans on a jury. By striking all of the African Americans, Williams made it even more likely that he would have a receptive audience for his argument.

[46] Two years before Snyder's trial, a *Times-Picayune* poll showed that support for the sheriff broke "generally along the racial lines of the parish, where 18% of the population is black." Bill Walsh, *No One Neutral About Harry Lee*, Times-Picayune, New Orleans, La., March 20, 1994, at A1. Despite the concerns of the black community, the sheriff handily won re-election in 1995 with 71% of the vote. *Top Ten West*

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The Louisiana Supreme Court majority upheld Williams' argument as a proper response to defense counsel's description of Snyder at the time of his arrest:

> . . . He was suicidal. He kept saying, "They're coming to get me. They're coming to get me." . . . [T]here's never been any indication that Mr. Snyder was somehow staging that particular incident in order to get himself a better situation or a better sentence or to help himself out in any way.

JA 784. While this argument by defense counsel may have invited a response *based upon the evidence before the court*, it hardly gave Williams license to go outside the record and invoke a sensational case which had resulted in divisions along racial lines.

An honest, ethical prosecutor, who felt that he was somehow compelled to raise the O. J. Simpson case in argument after promising the trial judge that he would not, would have approached the bench before the rebuttal argument, explained to the judge and defense counsel the reasons for his change of position and requested permission to mention the case. But Williams did not do that. He sprang the reference to the Simpson case in mid argument, catching the court and counsel by surprise. As Justices Johnson and Lemmon stated in their dissents in *Snyder I*, "It is blatantly clear that the prosecutor did not intend to keep his word," JA 801 (Johnson, J., dissenting) (quoting her earlier dissent in *Snyder I*), and "the prosecutor's intention to utilize racial bias became crystal clear

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Bank Stories of 1995, Times-Picayune, New Orleans, La., Dec. 31, 1995, at 1F.

when he commented during closing argument in the penalty phase that O. J. Simpson 'got away with it.'" JA 732-33 (Lemmon, J., dissenting).

IV. THE LOUISIANA SUPREME COURT ERRED WITH REGARD TO THE DEFERENCE IT GAVE THE TRIAL COURT'S RULINGS.

As previously set out, the Louisiana Supreme Court failed to accord the appropriate legal significance to factors identified by this Court in its *Miller-El* decisions and it failed to consider that evidence cumulatively at *Batson*'s step three as required by *Batson* and *Miller-El II*. It further erred in deferring completely to the trial judge's summary rulings.

The Louisiana Supreme Court majority purported to apply the "clearly erroneous" standard in reviewing the trial court's rulings on the *Batson* challenges. JA 766 n.6, 787.[47] However, it employed a degree of deference that would virtually eliminate appellate review of *Batson* issues. It concluded that a finding of discrimination "*would be an improper substitution of this court's evaluation for that of the trial court*" and that the record in this case "simply does not demonstrate that a reasonable

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[47] The Louisiana courts have held that a fact finding is clearly erroneous "'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Hernandez v. Bunge Corp.*, 814 So. 2d 783, 793 (La. App. 2002) (quoting *Zapata Haynie Corp. v. Arthur*, 980 F.2d 287 (5th Cir. 1992) (internal citation omitted)). *Cf. Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (defining "clearly erroneous" as "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed").

factfinder *must necessarily conclude* the prosecutor lied about his reasons for striking Scott or Brooks." JA 788 (emphasis added).[46]

The deference accorded the trial court is particularly unwarranted in this case, where, as both the Louisiana Supreme Court majority and dissenters pointed out, the trial court did not actively participate in jury selection and gave no reasons for its rulings. JA 787 (majority opinion); *id.* at 798, 799 (Kimball, J., dissenting); *id.* at 806 (Johnson, J., dissenting).

Even under the more demanding habeas corpus standard – not applicable here – "'[d]eference does not by definition preclude relief.'" *Miller-El II*, 545 U.S. at 240

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[46] The majority's error appears to be the result, in part, of its reliance on this Court's decision in *Rice v. Collins*, 546 U.S. 333 (2006), which it viewed as this Court's "most recent admonition" on "the leeway a reviewing court must grant a trial court in its evaluation of the credibility of the prosecutor in the third step of the *Batson* analysis." JA 772. However, in *Collins*, both the California courts and this Court found record support for the prosecutor's race-neutral justification that the stricken juror was young and lacked stable community ties and, unlike this case, found no record basis for discrediting the prosecutor's factual account of the juror's eye rolling. *Collins*, 546 U.S. at 339-40. Moreover, the "backdrop of the issues of race and prejudice" present in this case, JA 790 (Kimball, J., dissenting), was absent in *Collins*. Finally, because *Collins* was a federal habeas corpus case, the issue there was whether the state court's conclusions constituted "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2); *Collins*, 546 U.S. at 338. That statute did not apply to the direct appeal to the state supreme court in this case. *See id.* at 338-39 (noting that the trial court's credibility findings are reviewed on direct appeal in the federal courts (as in the Louisiana Supreme Court) for clear error, citing *Hernandez v. New York*, 500 U.S. 352, 364-66 (1991), but a state court's findings are reviewed in habeas corpus cases under the more demanding "unreasonableness" standard of § 2254(d)(2)).

(quoting *Miller-El I*, 537 U.S. at 340). However, in this case, the Louisiana Supreme Court defined deference so broadly as to preclude relief.

V. ALL OF THE CIRCUMSTANCES OF THE CASE, CONSIDERED TOGETHER IN ACCORDANCE WITH *MILLER-EL II*, ESTABLISH A *BATSON* VIOLATION.

This Court summarized its findings in *Miller-El II* as follows:

> . . . By the time a jury was chosen, the State had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones.
>
> It blinks reality to deny that the State struck [two black prospective jurors], included in that 91%, because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. . . .

545 U.S. at 266.

The reality is equally clear here. Prosecutor Williams knew that it would not be easy to convince a jury to sentence Allen Snyder to death. He increased his chances significantly by striking one hundred percent of the black prospective jurors.

The reality is that Williams struck Brooks and Scott, who were included in that one hundred percent, because they were black. As has been shown *supra* in Section II, the reasons Williams gave for striking them do not withstand scrutiny. Race mattered in this case – from Williams' pretrial comments that this was his "O. J. Simpson" case, to his striking every black prospective juror, to his comparison of Snyder with O. J. Simpson in his rebuttal argument. Here, as in *Miller-El II*, when the "evidence on the issues raised is viewed cumulatively, its direction is too powerful to conclude anything but discrimination." *Miller-El II*, 545 U.S. at 265.

To ignore this reality, as the Louisiana Supreme Court majority did, "invites cynicism respecting the jury's neutrality," and "undermines public confidence in adjudication."[49] This is well established by cases ranging from the "trial of the century" to those which are noticed only in the courthouses and communities in which they are tried.[50] Unless the rule of *Batson v. Kentucky* is enforced in Snyder's case and others like it, the rule itself will become a

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[49] *Miller-El II*, 545 U.S. at 238 (quoting *Georgia v. McCollum*, 505 U.S. 42, 49 (1992); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991); *Powers v. Ohio*, 499 U.S. 400, 412 (1991); *Batson v. Kentucky*, 476 U.S. at 87). *See also* JA 799-800 (Johnson, J., dissenting) ("I would have more confidence in the fairmindedness of this jury and the jury's pronouncement of the death sentence, had the state not used its peremptory challenges to exclude every African American juror, resulting in an all-white jury for this black defendant.") (quoting her dissent in *Snyder I*).

[50] *See* Edward S. Adams & Christian J. Lane, *Constructing a Jury That Is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. Rev. 703, 710-13 (1998) ("What becomes apparent in evaluating juries is the impact of jury demographics on the public's acceptance of verdicts and the public's perception of justice.").

source of cynicism that undermines public confidence in the judicial system's commitment to fair and equal justice.[51]

Last term, Justice Kennedy observed:

> Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. *The enduring hope is that race should not matter; the reality is that too often it does.*

Parents Involved in Community Schools v. Seattle School District, ___ U.S. ___, 127 S. Ct. 2738, 2791 (2007) (Kennedy, J., concurring) (emphasis added).

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[51] *See, e.g., People v. Randall*, 671 N.E.2d 60, 65 (Ill. App. 1996) ("We now consider the charade that has become the *Batson* process. . . . The State may provide the trial court with a series of pat race-neutral reasons. . . . [W]e wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.' "); Steve Bogira, Courtroom 302: A Year Behind the Scenes in an American Criminal Court House 260-62 (2005) (commenting, based upon a year of observing proceedings in one courtroom in Chicago, that "it's lucky that most of the jury-picking is being done in [a] back room, because as usual the process is anything but color-blind" and reporting that reasons such as "indicated that he would use objective reasoning" and demeanor "not satisfactory to the state" were upheld as race neutral under *Batson*).

The reality here is that the opportunity for jury service was denied to black citizens of Jefferson Parish because race mattered to the prosecutors in exercising their peremptory strikes.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Louisiana Supreme Court and remand this case with directions that it grant Snyder relief pursuant to *Batson v. Kentucky*.

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In The

Supreme Court of the United States

ALLEN SNYDER,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Louisiana

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QUESTION PRESENTED FOR REVIEW

Whether it was clearly erroneous for the state courts to accept as credible the race-neutral reasons stated by the prosecutor for his peremptory challenges of the three prospective jurors for whom contemporaneous objections were made.

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STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

Petitioner was convicted by a jury in a Louisiana court of first degree murder and sentenced to death. The Louisiana Supreme Court conditionally affirmed his conviction and sentence. Finding error, however, the court remanded the case for a hearing to determine whether a retrospective determination of petitioner's competence to have proceeded to trial was still possible. If so, the trial court was to hold a hearing to determine whether petitioner was competent at the time of the trial. *State v. Snyder*, 98-1078 (La. 4-14-99), 750 So.2d 832. J.A. 668. After the hearing the trial court found that such a hearing was possible and that the petitioner was competent to stand trial. On a second appeal, the supreme court affirmed. *State v. Snyder*, 98-1078 (La. 4-14-04), 874 So.2d 739. J.A. 742.

Petitioner sought certiorari which this Court granted. *Snyder v. Louisiana*, 545 U.S. 1137 (2005). J.A. 757. This Court vacated and remanded for further consideration in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005). The Louisiana Supreme Court again affirmed. *State v. Snyder*, 98-1078 (La. 9-6-06), 942 So.2d 484. J.A. 759. Rehearing was denied on December 15, 2006. This Court has granted petitioner's application for certiorari. J.A. 808.

II. FACTS OF THE CRIME

Petitioner did not below and does not herein dispute his guilt. As he states in his brief before this Court, he "was clearly responsible for the death of Howard Wilson." (Brief, p. 4). In its original opinion the state supreme court summarized the facts of the offense as follows:

Defendant, Allen Snyder, and his wife, Mary Snyder, were having marital difficulties in the summer of 1995. Towards the end of their relationship, neither partner remained entirely faithful to the other. After several incidents of physical abuse at the hands of her husband, Mary Snyder took their children and went to live with her mother. Despite this separation, defendant contacted Mary one evening in mid-August and the two discussed the possibility of getting back together. Mary agreed to meet defendant the following day to discuss a reconciliation. Defendant was anxious to meet with Mary and wanted to see her that evening, but she put him off, telling him she "didn't want to see him" that night. R., vol. 6, p. 1267.

Instead, Mary went out on a late night date with Howard Wilson, a married man she claimed she had recently met. Defendant repeatedly tried to page her during the evening, but Mary refused to respond. At the end of their date, at approximately 1:30 a.m. on August 16, 1995, Howard Wilson pulled his vehicle up to the home of Mary's mother to drop Mary off. Defendant walked up to the car, opened the driver's side door of the vehicle, and attacked both Howard Wilson and Mary Snyder with some sort of knife containing a double-edged blade. He inflicted nine wounds upon Howard Wilson and nineteen wounds upon Mary Snyder.

Gwen Williams witnessed the assault. She testified that she observed defendant stooped down beside a trailer that was across the street from the home of Mary's mother. She then saw defendant run from the trailer to Wilson's car, open the car door, jump into the car and attack Howard Wilson and Mary Snyder. Williams screamed at defendant which caused him to run away. Williams then helped Mary to her mother's house and the police were

called. Howard Wilson died at East Jefferson Hospital. Mary Snyder survived the attack and testified at trial.

Approximately twelve hours later, defendant called the police claiming he was suicidal. The police went to his house to investigate, initially unaware of the fact that he was a murder suspect, and found defendant barricaded in his house and curled into a fetal position on the floor. Police officers then took defendant to the Criminal Investigations Bureau and, after advising him of his rights, took a statement from defendant. In his statement, defendant claimed he went to Mary's mother's house "to see where she was and who she was with." Transcribed Audio Tape Statement, p. 3. He stated he brought a knife to "scare her, make 'em talk to me." Id. He told police that he approached the car not knowing whether Mary was inside the car or not. He opened the car door with the knife in hand and, according to his statement, told Howard Wilson they needed to talk. A scuffle then ensured. Defendant told police he was "out of control" at that time. Id. at 5. After the attack, defendant ran off, throwing the knife down somewhere along the way.

State v. Snyder, 98-1078 (La. 4-14-99), 750 So.2d 832, 836, 837, J.A. 669-671.

SUMMARY OF THE ARGUMENT

Petitioner claims the Louisiana Supreme Court erroneously found no merit to his claims alleging racial bias in the state's exercise of five of its peremptory challenges as to black prospective jurors. The allegation is that the state violated *Batson v. Kentucky*, 476 U.S. 79 (1986).

Petitioner acknowledges that he made no objection to two of the prospective jurors whose peremptory challenges he seeks to have reviewed herein. Because of the lack of contemporaneous objections, this Court should decline to review these challenges under *Batson*.

Batson requires a timely objection before the state can be required to provide race-neutral reasons for its exercise of peremptory challenges. Without an objection the trial court is denied the opportunity to consider and rule on the legitimacy of the state's reasons because none would have been given. Without a ruling by the state court there can be no review by a reviewing court. The record shows there were no objections by petitioner as to prospective jurors Greg Scott and Thomas Hawkins, Jr. Accordingly, the *Batson* claim as to them is not properly before this Court and should not be considered.

Similarly, the claim as to prospective juror Loretta Walker, although initially raised, was found to have been abandoned by the Louisiana Supreme Court when it was not urged by petitioner on the appeal on remand. Thus, it is also not properly before this Court for review. Alternatively, it is clear that, as the Louisiana high court found, her stated inability to consider the death penalty was a race-neutral reason for her excusal by the state. The state courts correctly found the *Batson* claim as to her had no merit.

The *Batson* claims as to Jeffrey Brooks and Elaine Scott were correctly rejected by the state courts. The state's race-neutral reasons were accepted as credible by the state trial judge and not found to be pretextual by the supreme court. This finding was not clearly erroneous. When considered under the deferential standard of review

to be applied by a reviewing court, the law and record offer no basis to reverse the state courts' rejection of petitioner's *Batson* claims.

Similarly, application of *Miller-El v. Dretke*, 545 U.S. 231 (2005) (referred to hereinafter as *Miller-El*), to this record should result in no relief to petitioner. *Miller-El* is a unique case whose conclusion of a *Batson* violation was based on evidence not present herein. The Louisiana Supreme Court's ruling on remand from this Court properly complied with this court's directive and correctly found no *Batson* violation. As such, the relief afforded Miller-El should not be granted to petitioner.

ARGUMENT

I. *BATSON*

At least since *Strauder v. West Virginia*, 100 U.S. 303 (1880), it has been an equal protection violation to consider a prospective juror's race when selecting a jury. This Court in *Batson* furthered the goal of the Fourteenth Amendment's equal protection clause to " . . . put an end to governmental discrimination on account of race." *Batson*, 476 U.S. at 85. *Batson* set forth a procedure by which challenges suspected of being based on race could be raised and ruled upon. When challenged, the proponent of the challenge must articulate race-neutral reasons for the exercise of a peremptory challenge. The reasons need not be persuasive or even plausible, but they must be race-neutral. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam). Petitioner must prove "purposeful discrimination." *Batson*, 476 U.S. at 93. The ultimate burden of persuasion regarding racial motivation rests with and

never shifts from, the opponent of the strike. *Purkett*, at 768.

Batson established that (1) a defendant must first show that the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors; (2) once the defendant makes a prima facie showing, the burden shifts to the state to come forward with a neutral explanation for challenging black jurors; (3) then the trial court will have the duty to determine if the defendant has established purposeful discrimination. *Batson*, 476 U.S. at 97, 98. In reviewing state courts' rulings on *Batson* challenges on direct review this Court is guided by *Hernandez v. New York*,[1] 500 U.S. 352 (1991). This Court noted that no statute or rule governs its review of facts found by state courts in cases in this posture. Unless exceptional circumstances are present, this Court would defer to the state court's factual findings. Id., at 366. Consideration of whether a prosecutor violated *Batson* is a "pure issue of fact." Id., at 364. As such, it is subject to review under a deferential standard. Id. *Hernandez* stated, "In *Batson*, we explained that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." Id., at 364. *Hernandez* continued, "*Batson's* treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard accords with our treatment of that issue in other equal protection cases." Id.

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[1] Although a plurality opinion, the concurring opinion of Justice O'Connor, in which Justice Scalia joined, agreed with the plurality that the Court reviews the trial court's finding as to discriminatory intent for "clear error" and agreed with its analysis.

At issue in a *Batson* challenge is the credibility of the prosecutor. "The decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Hernandez*, at 365. This finding " . . . largely will turn on evaluation of credibility." Id. *Hernandez* recognized that the best evidence will often be the demeanor of the attorney exercising the challenge. Evaluating the prosecutor's state of mind, i.e., intent, based on his demeanor and credibility lies peculiarly within a trial judge's province. Id., at 365. At the heart of the equal protection analysis is the credibility of the prosecutor's explanation. Once that has been settled, "there seems nothing left to review." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003). Nevertheless, *Miller-El v. Cockrell*, recognized that "deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340. Thus, the tension of competing principles at the heart of the issue herein: the deference which must be given to a trier of fact's finding of fact, i.e., no discriminatory intent, and a criminal defendant's right to be tried by a jury selected free of racial discrimination.

An advantage the trial court has over a reviewing court is that the trial judge observes the demeanor of the prosecutor in the context of the entire proceeding. Not only is that peculiarly within the trial court's province, it is uniquely within the trial court's province. The "great respect" which this Court is bound to give the state court's conclusions is explained in *Hernandez*, quoting *Akins v. Texas*, 325 U.S. 398 (1945): "Therefore, the trier of fact who heard the witness in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination." Id. at 368.

This Court has referred to this as the rule of deference in *Uttecht v. Brown*, ___ U.S. ___, 127 S.Ct. 2218 (2007), in the context of a *Witherspoon/Witt*[2] challenge. This Court stated that this rule is applicable to cases on direct review. This need to defer to the trial court remains because so much may turn on a potential juror's demeanor. *Uttecht*, 127 S.Ct. at 2233. This Court observed that

> The Court in *Witt* instructed that, in applying this standard, reviewing courts are to accord deference to the trial court. Deference is owed regardless of whether the trial court engages in explicit analysis regarding substantial impairment: even the granting of a motion to excuse for cause constitutes an implicit finding of bias. Id., at 430, 105 S.Ct. 844. The judgment as to "whether a veniremen is biased . . . is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations [are] entitled to deference even on direct review; the respect paid such findings in a habeas proceeding certainly should be no less." Id., at 428, 105 S.Ct. 844 (internal quotation marks, footnote, and brackets omitted). And the finding may be upheld even in the absence of clear statements from the juror that he or she is impaired because "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings."

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[2] *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wainwright v. Witt*, 469 U.S. 412 (1984).

> Id., at 424-425, 105 S.Ct. 844. Thus, when there is ambiguity in the prospective juror's statements, "the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve it in favor of the State." Id., at 434, 105 S.Ct. 844.
>
> *Uttecht*, 127 S.Ct. at 2223.

Similar understanding was expressed by the court of appeals in *Romero v. Lynaugh*, 884 F.2d 871 (5th Cir. 1989), *cert. denied*, 494 U.S. 1012 (1990), in considering cause challenges under *Witherspoon*. The court observed:

> The selection of a jury is inevitably a call upon experience and intuition. The trial lawyer must draw upon his own insights and empathetic abilities. Written records give us only shadows for measuring the quality of such efforts. Indeed, we recognize this cold fact of life by our standard for reviewing the rulings of judges presiding over jury selection. The Supreme Court in *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L. Ed. 2d 841 (1985), pulled back from earlier language in *Witherspoon* suggesting a de novo review of such decisions, requiring that federal habeas courts review by a clearly erroneous standard. The point is not that we review claims of ineffectiveness by a similar standard but rather that the standard by which we review decisions by trial judges accepts the reality that the selection process is more an art than a science, and more about people than about rules.

In applying the deferential standard the state submits that *Jackson v. Virginia*, 443 U.S. 2781 (1979), can be instructive. This Court's recognition in *Jackson* that the fact-finder's discretion may be impinged upon, but only to

the extent necessary to guarantee the fundamental protection of due process, can also be applied herein. The state respectfully submits that petitioner's conviction comports with equal protection and due process.[3] Thus, just as a reviewing court's role in reviewing the sufficiency of evidence to support a conviction is circumscribed, so, too, should a court reviewing a trial court's factual finding on a *Batson* claim be similarly circumscribed: this Court is not to ask itself if it believes the prosecutor's race-neutral reasons, but instead, is to ask whether any rational trier of fact could have accepted as race-neutral the prosecutor's reasons. As this Court stated in footnote 13, this standard does not permit a court to make its own subjective determination of guilt or innocence. Similarly, the deferential review by this Court, under the clearly erroneous standard, should not permit a reviewing court to substitute its judgment for that of the rational finder of fact. This record shows the trier of fact's conclusion to be rational. Thus, neither the facts nor the law justify setting aside the state courts' rulings.

Considering the rule of deference referred to in *Uttecht* and applicable through *Hernandez* and *Batson*, it was not clearly erroneous for the trial judge to have accepted the prosecutor's race-neutral reasons.

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[3] There can be no dispute that petitioner received a fair trial as defined by this Court in *Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("a fair trial is one in which evidence subject to adversarial testing presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.").

II. *MILLER-EL*

The Louisiana Supreme Court correctly analyzed and applied *Miller-El* to its second consideration of the *Batson* issue on remand. It accurately noted that *Miller-El* is a "fact-bound opinion," *Snyder*, 942 So.2d 489. The dispositive facts in *Miller-El* are unique to *Miller-El*. Their absence in this case distinguishes *Miller-El* from this case and does not compel the same result rendered therein. Thus, the application of *Miller-El* to this case shows no violation of *Batson*. Relief should be denied.

One of the jurors at issue in *Miller-El* was Billy Jean Fields. This Court found that the prosecutor, in offering his race-neutral reasons, "simply mischaracterized" Fields' testimony. Id. 545 U.S. at 244. It cannot be said that the prosecutor in petitioner's trial mischaracterized any of the challenged juror's testimony.

Numerous other factors, unique to *Miller-El* and relevant to this court's conclusion therein, and not present herein, further distinguish *Miller-El* and compel the conclusion that relief is not warranted herein. This Court went beyond comparing the questioning of panel members to consider other evidence, not present herein, of discriminatory intent – what this Court referred to as "broader patterns of practice during the jury selection." These included the prosecution's shuffling of the venire panel, its inquiry into views on the death penalty (such questions were asked herein but were not race-based) and questioning about minimum acceptable sentences. This Court found that these factors indicated "decisions probably based on race." *Miller-El*, 545 U.S. at 253.

The practice of "shuffling" to rearrange the order in which panel members are called for questioning was not

used in this case and is not a practice used at all in Jefferson Parish. Thus, this *Miller-El* factor is absent herein.

The scripts used in *Miller-El*, graphic (the prosecutors in *Miller-El* told the jury of injecting a substance through an IV in the condemned man's arm while strapped to a gurney in the death house) or general, were not used herein. Thus, this factor does not benefit petitioner. Also missing from this case, but a factor in *Miller-El*, is the use of jury questionnaires. Thus, the fact that the prosecutors noted the race of the prospective jurors on the questionnaires in *Miller-El* is not present herein because there are no questionnaires herein nor did the state in any manner note the panel members' race. The time involved in selecting the juries in these cases is also significant. Even with detailed questionnaires, it took five (5) weeks to pick the jury in Miller-El's case. *Miller-El v. Cockrell*, 537 U.S. at 328. Without questionnaires, it took less than two (2) days to pick petitioner's jury. Jury selection began on the morning of August 27, 1996. J.A. 17. Jury selection ended the next day. J.A. 28. Not only was the jury selection finished the day after it began but the state and petitioner's counsel each gave opening statements and the state called four witnesses before court recessed for the day. J.A. 28, 29.

Another distinguishing feature of *Miller-El* not present herein is what this Court called trickery – a kind of disparate questioning regarding minimum sentences for murder. Such questions about minimum sentences were not asked herein. Questions related to the death penalty or life in prison – the only sentencing option available for a first degree murder conviction in Louisiana. The state in *Miller-El* conceded that "... manipulative minimum

punishment questioning was used to create cause to strike." 545 U.S. at 261. This factor is not present herein.

This record also does not contain the "final body of evidence" present in *Miller-El* which confirmed this Court's conclusion that racial considerations were present in *Miller-El*: the district attorney's formal policy to exclude minorities from jury service. This was evidenced by testimony of two former prosecutors and a document known as the Sparling Manual. This manual contained an article which outlined the reasons for excluding minorities from jury service. *Miller-El* also involved testimony from a former prosecutor in the Dallas District Attorney's Office that his superior warned him that he would be fired if he permitted any African-Americans to serve on a jury. Id., at 264. There is no such policy, manual or directive herein.

The above factors, being unique to *Miller-El*, offer no legal or factual basis to grant relief to petitioner. The selection process therein, said this Court, was "replete with evidence that the prosecutors were selecting and rejecting potential jurors because of race." 545 U.S. at 265. The same cannot be said of the jury selection process in this case.

III. NO CONTEMPORANEOUS OBJECTION

In *United States v. Olano*, 507 U.S. 727, 731 (1992), this Court reiterated that

> No procedural principle is more familiar to this Court than that a constitutional right or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

This principle was again referred to recently by this Court in *Smith v. Texas*, ___ U.S. ___, 127 S.Ct. 1686 (2007):

> As a general matter, and absent some important exceptions, when a state court denies relief because a party failed to comply with a regularly applied and well-established state procedural rule, a federal court will not consider that issue.

The state initially asserts that petitioner did not preserve for review a *Batson* claim as to prospective jurors Greg Scott and Thomas Hawkins, Jr. Trial counsel did not object when the state exercised peremptory challenges to excuse Mr. Scott and Mr. Hawkins. *Batson* requires a contemporaneous objection. This Court assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation. *Johnson v. California*, 545 U.S. 162, 170 (2005). As this case shows, there is no explanation absent an objection. In *Batson*, this Court noted that defense counsel moved to discharge the jury on the ground that the prosecutor's removal of black veniremen violated the defendant's rights under the Sixth and Fourteenth Amendments. *Batson*, 476 U.S. 79, 83. *Batson* further stated that " . . . petitioner made a timely objection. . . ." Id. at 100. Justice White's concurrence also noted the necessity of an objection, "If the defendant objects, the judge, in whom the court puts considerable trust, may determine that the prosecution must respond." Id., at 101. This Court in *Strauder v. West Virginia*, 100 U.S. 303 (1880), noted that the defendant filed his objection prior to trial. Similarly, a pre-trial motion to strike the jury venire because of invidious discrimination in the selection of the jurors was filed and noted by this Court in *Swain v. Alabama*, 380 U.S. 2023

(1965). A more recent opinion from this Court reiterated the necessity for an objection. In *Johnson v. California*, 545 U.S. 162 (2005), a *Batson* issue was before this Court which stated, "Indeed, *Batson* held that *because the petitioner had timely objected* . . . " (emphasis added). The Court noted "The inherent uncertainty present in inquiries of discriminatory purpose. . . ." *Johnson*, at 169, 172. There can be no inquiry of discriminatory purpose absent an objection.

Other opinions from this Court on this issue noted the need for an objection. E.g., *Pierre v. Louisiana*, 306 U.S. 354 (1939) (defendant made a timely motion to quash the venire and indictment); *Powers v. Ohio*, 499 U.S. 400 (1991) (defendant objected during jury selection when prosecutor peremptorily challenged a black venireperson); *Campbell v. Louisiana*, 523 U.S. 392 (1998) (defendant filed pretrial motion to quash the indictment claiming longstanding practice of racial discrimination in selection of grand jury forepersons); *Alexander v. Louisiana*, 405 U.S. 625 (1972) (pretrial motion to quash because blacks included in jury venires in token numbers).

Louisiana Code of Criminal Procedure article 841[4] also requires a contemporaneous objection to preserve an alleged error for appellate review. Noting the lack of

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[4] Art. 841(A) states: "An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor."

This Court's Rule 14(1)(g)(i) similarly requires a showing that the issue was raised "in the court of first instance."

contemporaneous objections to two of the prospective jurors herein, the state supreme court observed:

> With respect to two prospective jurors, Greg Scott and Thomas Hawkins, Jr., this court previously found that the defendant waived any *Batson* claim on appeal by failing to object when the prosecutor struck the juror, although defense counsel noted their race for the record. More importantly, defense counsel did not ask the prosecutor to articulate his race neutral reasons for excusing Greg Scott and Hawkins. . . .

State v. Snyder, 98-1078 (La. 9-6-06), 942 So.2d 484, 493. J.A. 774.

In addition to La. C.Cr.P. art. 841, Louisiana jurisprudence requires a contemporaneous objection in capital and non-capital cases alike. In *State v. Taylor*, 93-2201 (La. 2-28-96), 669 So.2d 364, *cert. denied, Taylor v. Louisiana*, 519 U.S. 860 (1996), *reh. denied,* 519 U.S. 1023 (1996), the court reversed its policy of reviewing unobjected to assignments of error in capital cases and ruled that objections would be required to preserve for review alleged error in the guilt phase of a capital trial. This was (and is) the law at the time of petitioner's trial.[6]

The lack of a contemporaneous objection as to Mr. Scott is shown in the record:

> MR. WILLIAMS: The State excuses Mr. Scott.
> The State accepts Mr. Buquet.

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[6] This requirement was expanded to the penalty phase in *State v. Wessinger*, 98-1234 (La. 5-28-99), 736 So.2d 162, *cert. denied, Wessinger v. Louisiana*, 528 U.S. 1145 (2000).

MS. DaPONTE: I just need to note Mr. Scott is African American. I'd note that for the record. I'm not asking for anything.

J.A. 345.

Thus, because there was no objection, there was no ruling made by the state "court of first instance" which this Court could review.

Similarly, there was no objection and, thus, no ruling to review as to Mr. Hawkins. The record shows the following:

THE COURT: All right, Mr. Hawkins?

Mr. OLINDE: State excuses Mr. Hawkins.

MS. DaPONTE: Note for the record that Mr. Hawkins is a black juror.

MR. OLINDE: Are you making a challenge that you want me to make –

MR. VASQUEZ: She didn't object.

MR. OLINDE: Okay.

THE COURT: All right. Ms. Rizzo?

J.A. 400.

Petitioner acknowledges the absence of objections as to Mr. Scott and Mr. Hawkins. In his petition for certiorari, he writes, "The defense noted that Mr. Scott was African American, but did not lodge a *Batson* objection." (Petition, p. 5, 6). The petition as to Thomas Hawkins states, "The defense noted that Mr. Hawkins was African American, but did not lodge a *Batson* objection." (Petition, p. 6). Further showing the absence of timely objections,

petitioner notes that in his appeal he alleged ineffective assistance of counsel for the failure to timely raise *Batson* objections. (Petition, p. 12). In his brief, petitioner correctly states that defense trial counsel noted the race of the prospective jurors but did not object. (Brief, p. 13). Thus, these challenges should not be reviewed because, without a contemporaneous objection preserving the alleged error, there is no ruling to review.

Because there was no objection the three-step procedure of a *Batson* challenge was not initiated by the defendant. Thus, the prosecution did not offer race-neutral reasons and the court did not have to rule on them. Implicit in *Batson's* command that the defendant first make a prima facie showing is the necessity for an objection. Absent a timely objection, *Batson's* three-step process is never implemented. *Batson's* procedure includes the prosecutor's articulation of race-neutral reasons and the trial's court's ruling accepting or rejecting them. *Purkett v. Elem*, 514 U.S. 765 (1995). Accordingly, the claim as to Mr. Scott and Mr. Hawkins should not be considered because it was not properly preserved for "review" – there was no ruling which could be reviewed by the state supreme court or by this Court. The Louisiana Supreme Court had previously addressed the necessity for a contemporaneous objection to preserve a *Batson* challenge for review. The state high court, in *State v. Williams*, 524 So.2d 746 (La. 1988), said "In order to preserve the complaint that the prosecutor's use of a peremptory exception was based on race, the defense must make an objection before the entire jury panel is sworn." Referring to *Batson*, the Court added

> . . . it is clear from the suggestions in the opinion and from principles of judicial efficiency that the ruling must be made at the time when

> the trial judge can correct the error of which the objections complain. . . . the ruling on the objections must be made at some time before the completion of the jury panel.

In footnote 4 the court added,

> The very basis of the contemporaneous objection requirement (and of the prohibition against raising unobjected to errors on appeal) is to require the objecting party to call the error to the court's attention at a time when the court can effectively correct it. The reason for the contemporaneous objection requirement is defeated when the ruling on the objection is purposefully deferred until after the trial.

Williams, 524 So.2d n. 4 at 747.

The lack of an objection as to Mr. Scott and Mr. Hawkins precluded any ruling by the trial judge and by the state supreme court. That court concluded, "Defendant therefore waived any claim based upon the prosecutor's allegedly intentional discrimination against Gregg Scott and Thomas Hawkins, Jr. and the issue is not properly before this Court." *Snyder*, 750 So.2d at 840. J.A. 678. Thus, the claim as to these two prospective jurors should not be considered by this Court.

In addition to the lack of timely objections as to Mr. Scott and Mr. Hawkins, the state submits that the claim as to Loretta Walker is no longer properly preserved for review by this Court. This Court previously granted certiorari and remanded to the Louisiana Supreme Court for further consideration of its original ruling in light of *Miller-El v. Dretke*, 545 U.S. 31 (2005). *Snyder v. Louisiana*, 545 U.S. 1137 (2005). On remand the Louisiana

Supreme Court found that the claim as to Loretta Walker was no longer properly presented as an issue for review. Petitioner's brief on remand mentioned her in his introduction but did not include her in his argument. The state supreme court disposed of any *Batson* claim as to Loretta Walker by finding that "Currently, defense counsel makes no argument with regard to Loretta Walker, almost certainly because the record offers ample affirmative support for the prosecutor's challenge." *Snyder*, 942 So.2d at 493. J.A. 774. That the claim as to Loretta Walker was properly found to have been abandoned on appeal is shown by this Court's observation in *Rice v. Collins*, 546 U.S. 333 (2006): "A second African-American juror was also the subject of a peremptory strike, and although Collins challenged that strike in the trial court, on appeal he objected only to the excusal of juror 16." Thus, without a timely objection the issue is not preserved for review.

Based on the foregoing and Rules 14(1)(g)(i) and 15(2) the state submits that the claims as to Greg Scott, Thomas Hawkins, Jr., and Loretta Walker are not properly presented for review herein and should not be considered by this Court. The state will discuss the *Batson* claim as to Ms. Walker should this Court choose to consider it on the merits.

IV. LORETTA WALKER

During voir dire Ms. Walker was asked if she could consider the death penalty. Her response was simple and direct: "No, I could not." J.A. 407. She was then asked if her inability to consider the death penalty was " . . . based upon longstanding religious, moral or personal belief that you have?" She replied, "Religious, yes." J.A. 408. She did

say, however, that it was possible that terrible facts could make her change her mind. J.A. 408. During subsequent questioning she again replied that she could not consider imposing the death penalty:

MR. WILLIAMS: Okay, Ms. Walker, back to you. I'm not picking on you, just want to find out how you feel. Now, you told me that you didn't – Because of religious belief, you couldn't impose the death penalty?

MS. WALKER: Right.

MR. WILLIAMS: Now, my next question was: Would that be – You can't imagine a situation where you would sentence that man to death because of your long-standing religious belief?

MS. WALKER: Because I don't know the circumstance, I can't say.

J.A. 413.

Ms. Walker was further questioned as follows:

MR. WILLIAMS: Good. So, I'll ask you again, ma'am: Could you consider the imposition of the death penalty?

MS. WALKER: No, I could not.

MR. WILLIAMS: Okay. And that's based upon a longstanding religious, moral or personal belief; is that correct?

MS. WALKER: Right.

J.A. 416.

She did add that in a case of child molestation or the killing of an innocent child she could consider the death penalty. J.A. 417. When she was excused by the State, defense counsel asked for race-neutral reasons. The prosecutor replied, "the reason is very obvious that at first she said she could not do the death penalty for a longstanding (sic), and then she said under a limited circumstance if he killed a child, she could do it. We don't have any evidence that this man killed a child, so." J.A. 447. A prospective juror's statements that, except in a certain circumstance not applicable herein, she could not impose the death penalty is a race-neutral reason. While it could be debatable whether her views would have supported a cause challenge, (the prosecutor stated that he had rehabilitated her) it cannot be debated that a juror's belief which would cause her to oppose the death penalty, i.e., be unable to apply the law, is a race-neutral reason for excusal from the panel. As stated in *Hernandez v. New York*, 500 U.S. 352 (1991), "While the reason offered by the prosecutor for a peremptory strike need not rise to the level of a challenge for cause . . . the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character." Id., at 362, 363. *Batson* said the same: . . . "we emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." Id., at 97. As noted above, the state supreme

court found the claim as to Ms. Walker had been abandoned. It opined that the reason for abandoning the claim was that it had no merit:

> Walker stated initially that she could not consider the death penalty under any circumstances. Upon further questioning, Walker conceded that she could consider capital punishment in the case of the murder of a child. As the prosecutor informed the trial court, this case did not involve the killing of a child, and he therefore excluded Walker peremptorily on the basis of her general opposition to the death penalty.

Snyder, 942 So.2d n. 12 at 493. J.A. 774.

The state court's conclusion that her excusal was proper given her statement that she could not consider imposing the death penalty was correct. Petitioner is entitled to no relief. The state courts' rulings that her excusal was not a *Batson* violation are supported by the law and were not clearly erroneous.

V. ELAINE SCOTT

Petitioner also contends a *Batson* violation occurred when the state excused Elaine Scott. This claim also has no merit and offers no basis to grant relief.

When Elaine Scott was asked if she could consider imposing the death penalty if the defendant was found guilty she replied, "I think I could." J.A. 361. Her original response must have been inaudible because before what apparently was her second reply was recorded or heard by the stenographer defense counsel interjected and said, "I'm sorry, I can't hear you." Ms. Scott then stated, "I think I could." J.A. 361. When Ms. Scott was tendered the state

excused her. Counsel then asked for race-neutral reasons. The prosecutor, without waiting for the court to order reasons, offered his reasons:

THE COURT: Ms. Scott.

MR. OLINDE: Excused.

MS. DaPONTE: Judge, at this time, I would note for the record Ms. Scott is an African American juror, and that's three, now. I'd like a – I think that there has been a pattern, and I would ask the State to provide a racially neutral reason.

MR. WILLIAMS: For Ms. Scott, the reason is I observed she was very weak on her ability to consider the imposition of the death penalty. Her words, exactly – I wrote it down, that she thinks she could, and that's the reason for our challenge.

MR. OLINDE: And she was very – My notes indicate she was very positive on when I said about a life sentence, she was very positive on her reason – Her agreement that she could do that. It's for that reason –

MR. VASQUEZ: You know, the law is clear. If I were doing the same thing, they'd be up here holding me to the same standard. This lady indicated that she could consider both. She was honest

about it. She also said she could consider the death penalty. She was not hiding anything. She knows how to get off of this jury if she wants to, either way, and she could have done that. She's kept an open mind, and that's what we're looking for.

MR. OLINDE: Your Honor, –

MR. VASQUEZ: That is not a sufficient reason.

MR. OLINDE: This is a peremptory challenge. I'm not asking to excuse her –

MR. VASQUEZ: This is a Batson challenge.

MR. OLINDE: No, this is a peremptory challenge by us, and we can do it if we find anything that makes us believe that she's weak on death. We can excuse her for that reason.

MR. WILLIAMS: The Supreme Court has so held in the case that I – Feltus Taylor.[6] There's probably

[6] The prosecutor's reference was to *State v. Taylor*, 93-2201 (La. 02-28-96), 669 So.2d 364, in which the state supreme court in an unpublished appendix rejected Taylor's *Batson* claims where the court accepted as race-neutral reasons that the prospective jurors opposed or were ambivalent about the death penalty. The opinion listed many cases, state and federal, which found legitimate race-neutral reasons, one of which is evidently applicable to Ms. Scott, that of a "weak personality" as shown by her saying she "thinks" she could impose the death penalty and by her not speaking loudly enough to be heard.

50 reasons, and one of the reasons that we gave has been declared race neutral, and it is. I mean, it is; she's weak.

THE COURT: All right. I'm going to go ahead and allow the challenge.

MR. VASQUEZ: Please note our objection.

J.A. 401, 402.

The equivocation and uncertainty as to Ms. Scott's ability to follow the law, evidenced by her stating that she thinks she could, as opposed to a more affirmative statement that she could, is a race-neutral reason justifying the state's excusal of her. What is not available for this Court's consideration is the tone of voice Ms. Walker used, any eye contact with the prosecutors, her body language. These factors, observable by the attorneys and the trial court, cannot be observed by a reviewing court. Such factors give flavor to the proceedings and provide trial counsel and the court of first instance with more information than can be gleaned from a review of a transcript. The observation in *Hernandez v. New York*, 500 U.S. 352, 368 (1991), relative to witnesses, is equally applicable to a review of proceedings during voir dire, "Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination." Quoting *Akins v. Texas*, 325 U.S. 398 (1945). Equally apropos is this Court's comment in *Rice v. Collins*, 546 U.S. 333 (2006) that the trial court has the benefit of observing the prosecutor firsthand over

the course of the proceedings. The court properly overruled the objection. That ruling was not clearly erroneous.

VI. JEFFERY BROOKS

Petitioner contends the state courts erred in accepting the race-neutral reasons offered in support of the state's challenge of Jeffery Brooks. This claim offers no basis for relief.

When the state challenged Mr. Brooks through the use of a backstrike,[7] the prosecutor did not wait for the court to rule on whether a prima facie case had been made by the defense which would require a race-neutral reason. Instead the prosecutor immediately volunteered his reasons:

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[7] Backstriking is a party's exercise of a peremptory challenge to strike a prospective juror after initially accepting him. *State v. Hailey*, 02-1738 (La. App. 4th Cir. 9-17-03), 863 So.2d 564, 567, *writ denied*, 04-0612 (La. 2-18-05), 896 So.2d 20.

In *State v. Taylor*, 93-2201 (La. 2-28-96), 669 So.2d 364, 376, *cert. denied*, 519 U.S. 860 (1996), the court stated

> However, La. Code Crim. P. art. 795(B)(1), provides that peremptory challenges shall be exercised prior to the swearing of the jury panel. Since the jury panel is not sworn until all individual jurors and alternates have been selected, under La. Code Crim. P. art. 790, peremptory challenges may be exercised even after tendering of jurors under subsection (A) of Article 788. In other words, peremptory challenges are exercisable at any time before the jury panel is sworn. *State v. Watts*, 579 So.2d 931 (La. 1991) ("A juror temporarily accepted and sworn in accordance with LSA C.Cr.P. art. 788 may nevertheless be challenged peremptorily prior to the swearing of the jury panel in accordance with LSA C.Cr.P. Art. 790. LSA C.Cr.P. Art. 795(b)(1)").

It referred to this practice as "back striking." Id., at 376.

MS. DaPONTE: Judge, Mr. Brooks is an African-American, and I would ask the State to provide a racially neutral reason for their backstrike.

MR. WILLIAMS: I will provide three. I thought about it last night. Number 1, the main reason is that he looked very nervous to me throughout the questioning. Number 2, he's one of the fellows that came up at the beginning and said he was going to miss class. He's a student teacher. My main concern is for that reason, that being that he might, to go home quickly, come back with guilty of a lesser verdict so there wouldn't be a penalty phase. Those are my two reasons.

MR. VASQUEZ: Do you want me to respond or do you want –

MS. DaPONTE: Judge, I think there's –

MR. WILLIAMS: There's nothing to respond to.

MS. DaPONTE: Yeah, I don't think there is, either –

MR. WILLIAMS: It's either is or there isn't.

MS. DaPONTE: – but I would – No, that's all. I would just say that if he wants to go home early, he's got to come back with the death penalty.

MR. WILLIAMS: No, I think that's –

MR. VASQUEZ: That's not relevant, anyway.

MR. WILLIAMS: The hell it isn't relevant. It's happened to me before –

MR. VASQUEZ: That was –

MR. WILLIAMS: – where jurors – If this case goes to the jury on Friday and one of them gets back there and gets smart and thinks that if they come back guilty of second degree murder, they won't have to do a penalty phase. I guarantee that's a very real concern to –

MR. VASQUEZ: I was talking to Ms. DaPonte, not to you, and I was referring to something else.

His main problem yesterday was the fact that he didn't know if he would miss some teaching time as a student teacher. The clerk called the school and whoever it was and the Dean said that wouldn't be a problem. He was told that this would go through the weekend, and he expressed that that was his only concern, that he didn't have any other problems.

As far as him looking nervous, hell, everybody out here looks nervous. I'm nervous.

MR. OLINDE: Judge, it's –

MR. VASQUEZ: Judge, that's – You know.

MR. OLINDE: – a question of this: It's a peremptory challenge. We need 12 out of 12 people. Mr. Brooks was very uncertain and very nervous looking and –

THE COURT: All right. I'm going the allow the challenge. I'm going to allow the challenge.

MS. DaPONTE: And, Judge, can I – I just need to make the record.

Your Honor, Mr. Brooks was the first African American chosen. The State subsequently proceeded to cut, at this point; it's either three or four and the record will reflect which it is, and the State has now gone back and cut the only African American that they chose. So that that needs to be on the record.

MR. VASQUEZ: Please note our objection.

J.A. 444-446.

On remand the state supreme court expanded on Mr. Brooks' concern over missing class:

> Brooks, on the other hand, was attempting to complete his college courses in order to begin a career in teaching. The fact that Brooks actually approached the bench on his own violation and raised his teaching obligations as a hardship excuse indicates he was truly concerned, more so

> than Sandras and Yeager. When Brooks approached the bench to raise a hardship concern at the beginning of the jury selection proceeding, Brooks stated to the court that 'there is something I'm missing right now that will better me towards my teaching career.'
>
> J.A. 780, 781.

The court's observation that Mr. Brooks initiated his concern, as well as the prosecutor's similar statement that Brooks was one of the fellows that came up at the beginning, was based on the proceedings at the beginning of voir dire. Petitioner candidly agrees that "at the beginning of voir dire, Brooks had expressed concern that jury service might interfere with observation of a class as part of his preparation for student teaching." (Brief, p. 10, 11).

The circumstances as to how Mr. Brooks came to express his hesitancy to serve on the jury are reflected in the record. When the venire was summoned to Judge Hand's court room he introduced the court staff and read the qualifications for jury service. J.A. 59. After he finished he asked for a show of hands if anyone did not qualify. He next told a venire member, evidently in response to her raising her hand, "Do you want to come forward?" J.A. 59. This began a parade of venire members with their reasons why they could not serve. One of the members who approached the bench with concerns about serving was Jeffrey Brooks. This was before he was asked any questions by the attorneys. The record shows:

> THE COURT: Next.
>
> MR. JEFFREY BROOKS:
>
> My name is Jeffrey Brooks. I'm a student at Southern

University, New Orleans. This is my last semester. My major requires me to student teach, and today I've already missed a half a day. That is part of my – it's required for me to graduate this semester.

MS. daPONTE: Mr. Brooks, if you – how many days would you miss if you were sequestered on this jury? Do you teach every day?

MR. JEFFREY BROOKS:

Five days a week.

MS. daPONTE: Five days a week.

MR. JEFFERY BROOKS:

And it's 8:30 through 3:00.

MS. daPONTE: If you missed this week, is there any way that you could make it up this semester?

MR. JEFFERY BROOKS:

Well, the first two weeks I observe, the remaining I begin teaching, so there is something I'm missing right now that will better me towards my teaching career.

MS. daPONTE: Is there any way that you could make up the observed observation that you're missing today, at another time?

MR. JEFFERY BROOKS:

It may be possible, I'm not sure.

MS. daPONTE: Okay. So that –

THE COURT: Is there anyone we could call, like a Dean or anything, that we could speak to?

MR. JEFFERY BROOKS:

Actually I spoke to my Dean, Doctor Tillman, who's at the university probably right now.

THE COURT: All right.

MR. JEFFREY BROOKS:

Would you like to speak to him?

THE COURT: Yeah.

MR. JEFFREY BROOKS:

I don't have his card on me.

THE COURT: Why don't you give Angela his number, give Angela his name and we'll call him and we'll see what we can do.

(MR. JEFFREY BROOKS LEFT THE BENCH)

J.A. 102-104.

The proceedings with Mr. Brooks resumed as follows:

THE LAW CLERK:

Jeffrey Brooks, the requirement for his teaching is a three hundred clock hour observation. Doctor Tillman at

> Southern University said that as long as it's just this week, he doesn't see that it would cause a problem with Mr. Brooks completing his observation time within this semester.

(MR. BROOKS APPROACHED THE BENCH)

THE COURT: We talked to Doctor Tillman and he says he doesn't see a problem as long as it's just this week, you know, he'll work with you on it. Okay?

MR. JEFFREY BROOKS: Okay.

(MR. JEFFREY BROOKS LEFT THE BENCH).

J.A. 116.

Nervousness and a concern over his preoccupation with missing student teaching requirements for graduation were the race-neutral reasons articulated for the excusal of Mr. Brooks. Capital trials are not brief and although this one was relatively short for such a trial, there was no way to know how long the trial would last. A trial can last longer than anticipated. Additionally, although the attorneys may be able to state with some confidence how long the evidentiary portion of a trial may last, no one could predict with any accuracy how long the jury's deliberations would take. First, the jury would have to unanimously render a verdict. If that verdict was guilty of first degree murder, a second deliberation would be required after the evidentiary portion of the penalty phase. The unanimity requirement could lengthen the

time of the deliberations and, in turn, the length of the trial.

A concern over not fulfilling his graduation requirements could have been a cause of great anxiety for Mr. Brooks and resulted in his being distracted and overly concerned with concluding the trial as quickly as possible, i.e., attempting to have the jury return a lesser verdict to avoid the additional time the penalty phase would entail. Such fears on the part of the prosecutor are legitimate. The prosecutor added that he had a previous experience with a juror who apparently wanted a trial to conclude sooner rather than later and not proceed to a penalty phase. The prosecutor stated, "It's happened to me before – ." J.A. 445. Wanting to avoid that from happening again is a race-neutral reason.

Making up missed hours is not a simple matter. Mr. Brooks had to observe or otherwise complete 300 hours during the semester according to the judge's law clerk who related a conversation with the dean of the college, Dr. Tillman. J.A. 116. The trial was at the end of August. College semesters usually end in early to mid-December. This generally left Mr. Brooks three months to complete his 300 hours of observation/student teaching.[8] That three month plus period had approximately 70 school days. Assuming a generous 6 hours per school day in school, Mr. Brooks would have to observe/teach 6 hours per day for 50

[8] The judge's law clerk reported that Mr. Brooks had to observe for 300 hours. Mr. Brooks said he was required to student-teach. This would require much more than simply showing up to observe or instruct in class. Student teaching requires preparation of lesson plans, preparing and grading tests and attendance at after-hours extracurricular activities.

days to complete his requirements. Additionally, he may have to attend his own classes with their attendant workload. The 300 hour requirement appears to be a heavy burden in itself, much less when one considers the other demands on a student. Mr. Brooks was required to spend two weeks observing and then would begin full time student teaching. By being in court, he said, he was already missing some of what was necessary for his graduation. J.A. 103. Thus, the concern by the prosecutor that Mr. Brooks would have other things on his mind instead of the trial was based on the record and common sense. It was also reasonable and race-neutral. It is quite possible that if Mr. Books had not completed his requirements by the end of the semester he would not be able to make it up. He would then have to complete them the following semester. Graduating a semester beyond when one expects to graduate is no small matter. His situation, as the state supreme court noted, was different from other panel members who were missing work, but who "were employed and apparently already had established careers." *Snyder*, 942 So.2d at 496. J.A. 780. The challenge was perfectly legitimate, race-neutral and was certainly not an equal protection violation.

Further, as shown in footnote 5 above, backstriking is statutorily authorized. Thus, petitioner's assertion that the backstrike of Brooks is evidence of discriminatory intent is unsupportable. Like any peremptory challenge, it is subject to a *Batson* challenge. It is no more and no less evidence of discriminatory intent than is any other challenge. It must be viewed on its own merits regardless of when it is exercised. To assert, as does petitioner, that the backstrike was used to "lull the defense lawyers into not making a *Batson* challenge when it struck the next two

black jurors," (Brief, p. 38) cannot be taken seriously. Petitioner's two trial attorneys are too competent and experienced to be "lulled" into not making an objection if they believed one was appropriate. They made *Batson* objections when they deemed them appropriate and noted the race of challenged black jurors, but explicitly did not object when they deemed that appropriate. For example, when the jury was picked and only the selection of two alternates remained, counsel commented, "If I need to preserve error, I need to preserve error." J.A 550. When the state challenged for cause a black prospective juror/alternate, defense counsel noted his objection. J.A. 584. When co-counsel noted his race the prosecutor started to offer race-neutral reasons. Defense counsel interjected and said, "No, we're not making a *Batson* challenge." J.A. 584. They were not shy about seeking to protect petitioner's best interest, see, e.g., the pre-trial motion to prevent the prosecutor from mentioning O.J. Simpson. The use of a backstrike in and of itself is a neutral act. To say utilizing the procedure is evidence of discriminatory intent is to say the converse: utilizing a challenge that is not a backstrike is evidence of no discriminatory intent. Whatever this Court concludes as to the *Batson* challenge of Brooks it cannot be predicated on his excusal via a backstrike in and of itself. Indeed, petitioner's counsel exercised two backstrikes. J.A. 26, 27, 547, 489.

VII. DISPROPORTIONATE IMPACT

Petitioner also relies on the fact that petitioner was tried by a jury from which the five black prospective jurors were excused by the state. Such reasoning, however, does not take into account each of those jurors as individuals

nor does it consider the circumstances of each excusal under the applicable jurisprudence.

As discussed above, the state submits that petitioner has only preserved for review in this proceeding two of the challenged jurors. As noted above, and as petitioner agrees, *Batson* objections were not made as to Greg Scott and Thomas Hawkins, Jr. Thus, their excusals are not before this Court for *Batson* review.

Similarly, the Louisiana Supreme Court accurately found its task on remand "eased" by the choice of petitioner not to pursue the *Batson* issue as to Loretta Walker. J.A. 773. The choice to forego the claim as to Ms. Walker on remand was no more than good appellate lawyering. As this Court said in *Jones v. Barnes*, 463 U.S. 745, 251, 752 (1983):

> Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Justice Jackson, after observing appellate advocates for many years stated:
>
> > 'One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces me that multiplying assignments

> of error will dilute and weaken a good case and will not save a bad one.' Jackson, Advocacy Before the United States Supreme Court, 25 Temple L.Q. 115, 119 (1951).

Justice Jackson's observation echoes the advice of countless advocates before him and since. An authoritative work on appellate practice observes:

> 'Most cases present only one, two, or three significant questions. . . . Usually, . . . If you cannot win on a few points, the others are not likely to help. And to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones.' R. Stern, Appellate Practice in the United States 266 (1981).

As discussed above, Loretta Walker's excusal was clearly race-neutral given her initial assertion that she could not consider the death penalty. J.A. 407. Thus, her excusal should not form a basis to afford petitioner relief under *Batson*. Petitioner's disparate impact contention should be considered not as the state excusing five out of five black prospective jurors, but as excusing two out of two. The state is not saying that the state's unobjected to excusals of Greg Scott and Thomas Hawkins, Jr., may not be considered at all. Under *Batson*, their excusals could be considered as a "relevant circumstance." However, their excusals should not constitute a free-standing *Batson* claim. Also, because of the lack of any objection to their

excusals, their excusals should be given little, if any, weight when considering the *Batson* claims that are properly before this Court.

As to the alleged disproportionate impact of the state excusing the two prospective black jurors at issue, the state submits that this factor was not central to this Court's disposition in *Miller-El*. In considering the numbers in *Miller-El*, where 10 of 11 black prospective jurors were peremptorily excused by the state, this Court said, "These numbers, while relevant, are not petitioner's whole case." *Miller-El v. Cockrell*, 537 U.S. at 331.

Thus, this record does not support a finding of intentional racial discrimination as this Court found in *Miller-El*. ("The evidence suggests, however, that the manner in which members of the venire were questioned varied by race." *Miller-El v. Cockrell*, 537 U.S. at 332). The state further submits on this issue this Court's decisions in *Washington v. Davis*, 426 U.S. 229 (1976) and *Hernandez*, supra.

Batson cited *Washington* to state that the insidious quality of governmental action claimed to be racially discriminatory must be traced to a racially discriminatory purpose. *Batson*, at 93. *Washington* said that "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution." Id., at 242. Further, *Hernandez* stated that a court must keep in mind the fundamental principle that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. Id., at 359.

Thus, the finding by the trial court that the state's challenges of Mr. Brooks and Ms. Scott were race-neutral

militates against a reviewing court, paying proper deference to the credibility findings of the trier of fact, from finding an equal protection violation and reaching a contrary conclusion.

The disproportionate impact of excusing the only black prospective jurors from serving is, like the use of a backstrike, in and of itself, a neutral fact. The question should not be were there no blacks on the jury, but why. *Batson* provides the framework for answering that question. The state trial judge answered it. That ruling was not clearly erroneous. It should not be disturbed.

VIII. DISPARATE QUESTIONING

Petitioner attempts to show that questions asked or not asked of Brooks and other prospective jurors is evidence of discriminatory intent. The record shows that this is not so.

Petitioner's attempt to equate Brooks' approaching the bench with that of Ronald Laws and Brendan Burns is unavailing. Laws acknowledged that if he was selected for service he would have to make other arrangements for his children as best he could. His contracting customers would have to have their move-in dates delayed. J.A. 130.

Similarly, Brendan Burns' main concern was his two daughters, ages 14 and 17. Petitioner's counsel asked about getting help with that concern. He replied that he would have to talk to them to see who to use. The court advised him to make phone calls to make whatever arrangements he needed to make. J.A. 106. He was excused by petitioner's counsel after being accepted by the state. J.A. 268. This should be a surprise to no one: he had

previous criminal jury service where a guilty verdict was returned. J.A. 203. The situations of Mr. Laws and Mr. Burns are manageable, unlike that of Mr. Brooks, whose time to complete his graduation requirements was time sensitive – and his time was running.

Petitioner also divines discriminatory intent from the prosecutor's acceptance of Arthur Yeager, Michael Sandras and John Donnes. Each of their situations is different, just as each individual is different. Although Mr. Yeager had a longstanding commitment, he readily acknowledged that he could make some phone calls and, in response to counsel's questions, agreed he would be able to make arrangements and it would not be a problem. J.A. 468. This was part of the colloquy with counsel who "could almost guarantee you that that won't be affected, but I appreciate you're telling me. I think we will be out of here by then." J.A 468.

As to the circumstances of Michael Sandras, the university teacher, he said a prolonged absence would be a real problem but he would have to somehow pass on the information concerning work. J.A. 467.

As to John Donnes it was evident that he would be challenged by the defense. He had previously served on a jury that had returned a verdict of guilty. J.A. 463. He would consider the death penalty. J.A. 456. Mr. Donnes had reservations about accepting an insanity defense. "I have a little problem with that. I could accept guilty and insane, but I can't reconcile my feelings." J.A. 460. Being advised that the dual plea was an acceptable, lawful defense did not change his opinion. J.A. 461. His concerns prompted further questioning of him by petitioner's counsel. J.A. 468. He reiterated that he had a "little

problem with not guilty and not guilty by reason of insanity . . . I could say, in other words, he was guilty and he was insane . . . or he's guilty for other reasons . . . but I can't have not guilty just because he went insane." J.A. 469. Considering that petitioner was tried on a plea of not guilty and not guilty by reason of insanity, J.A. 15, it was clear that petitioner's counsel would challenge him.

An additional fact that would tend to cause competent counsel to challenge Mr. Donnes was that he was working for the district attorney's election campaign. At the time of this trial the interim district attorney for Jefferson Parish was Jack Capella. His campaign for the October primary was well underway when this case was tried. Mr. Donnes volunteered to petitioner's counsel that "I'm working for Mr. Capella, too, on Saturdays." J.A. 481. "Whenever I had a little time on Saturdays, I'd try to go over there." J.A. 482. Petitioner's counsel had several good reasons to challenge Mr. Donnes: he would consider the death penalty, he did not accept the insanity defense, he previously convicted a defendant when serving on a jury and he was actively working on the election campaign of the district attorney who was the boss of the prosecutors. Although counsel initially accepted Mr. Donnes, J.A. 490, counsel, as is permitted by Louisiana law (see footnote 7, supra), exercised a backstrike and peremptorily excused Mr. Donnes. J.A. 27, 547. That the state did not question Mr. Donnes about canceling too many things if he was picked for the jury, J.A. 467, is of no moment: that was not mentioned until after the state finished questioning him and tendered him to the defense. J.A. 466, 467.

As shown by the foregoing, petitioner's claim of disparate questioning should not be accepted at face value or considered out of context. Each prospective juror is a

unique individual who is to be considered as such. Saying everyone should be asked the same questions regardless of their unique circumstances would be an affront, if not an insult, to the panel members' dignity and to the attorneys who questioned them. Certainly, it cannot be said of the prosecutor's questions herein that the alleged disparate questioning approaches anywhere near the level of that in *Miller-El*, which this Court found so exceptional as to call it "trickery." *Miller-El*, 545 U.S. at 261. The questioning herein was fairly mundane, generic and typical for a capital trial in Jefferson Parish. Petitioner's brief captures the unremarkable voir dire proceedings: "The lawyers were allowed to give lengthy explanations of legal concepts, to address their questions to individual jurors as well as the entire panel, and to question individual jurors at length." (Brief, p. 9). This presents another distinction in this case compared to *Miller-El*. Jury selection in that case "took place during five weeks." *Miller-El v. Cockrell*, 537 U.S. at 328. Jury selection in petitioner's case took two (2) days. On the second day after jury selection was completed, there was still time before the 6:10 p.m. adjournment, for both sides to give opening statements and for the state to call four (4) witnesses. J.A. 28, 29. There is obviously a significant difference between the voir dire proceedings in Dallas and those in Jefferson Parish. For one thing, a lot fewer questions are asked herein than were asked in *Miller-El*. Thus, petitioner's claim that the state herein could have asked more questions (Brief, p. 30, 31) must be considered in the context of the brief amount of time actually spent during voir dire.

IX. THE O. J. SIMPSON ARGUMENT

Petitioner, particularly through the amicus brief filed on behalf of The Constitution Project, seeks to bolster his

claim that *Batson* was violated by the prosecutor's reference to the O.J. Simpson case in his rebuttal argument of the penalty phase. This was three days after the *Batson* objections were overruled. In addition to the fact that, as noted by the state supreme court, "The portion of the State's rebuttal argument that the defendant now complains about was in direct response to" [defense counsel's argument], J.A. 785, this claim does not warrant relief because its basis was not in existence at the time the *Batson* objections were made and ruled upon. Thus, any consideration of this claim would not involve a higher court's review of the trial court's rulings, but would instead involve a partial de novo consideration of a claim in light of information not knowable to the trial court when it ruled. The state submits that a statement by the Louisiana Supreme Court in *State v. Green*, 94-0887 (La. 5-22-95), 655 So.2d 272, is applicable to any review of a *Batson* claim: "Thus, the sole focus of the *Batson* inquiry is upon the intent of the prosecutor at the time he exercised his peremptory strikes." Id., at 287. This is consistent with this Court's statement in *Miller-El* that " . . . a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives." Id., 545 U.S. at 252. When the trial judge ruled on the *Batson* objections the O.J. Simpson comment could not have been considered because it had not yet been made. Therefore, because it could not have been considered by the trial court it should not be considered by a reviewing court.

Consideration of this issue must also recognize that the issue is not whether the prosecutor made an improper argument or went back on his word not to mention O.J. Simpson. The O.J. Simpson case was an historical fact of

which the jury would have been aware. The mentioning of it was no more than pointing out some obvious similarities between the two cases: a husband upset over his wife's perceived relations with someone else, a furious attack of his wife while in the company of another man, the attacks result in death, the attacks are with knives, afterwards O.J. Simpson and petitioner each indicated suicide was being considered.

Indeed, defense counsel's argument which prompted the prosecutor's O.J. Simpson reference was quoted by the Louisiana Supreme Court as follows:

> Some of the mitigating circumstances that we believe we've been able to demonstrate to you . . . [relate to] whether Mr. Snyder was under extreme emotional or mental influence at the time of this particular incident. . . . I really didn't have to do much to show facts that might suggest that, because the State, when they put on their case, . . . the officer from Kenner . . . said that when he found Allen Snyder a couple of hours or 12 hours or so after this incident, he was curled up in a fetal position. He was suicidal. He kept saying, "They're coming to get me. They're coming to get me" . . . [T]here's never been any indication that Mr. Snyder was somehow staging that particular incident in order to get himself a better situation or a better sentence or to help himself out in any way.
>
> The testimony of that officer was accurate and it was truthful. The other thing that he testified to was that that house was in shambles. The furniture was strewn all about. Furniture was put up doors were barricaded. The furniture was being used as a barricade. . . . I'll ask you if that

> is not suggestive of some sort of [mental] disturbance.
>
> J.A. 784, 785.

The state supreme court, after considering petitioner's contentions, reviewing the record and noting that "Counsel's citations to authorities concerning the Simpson trial never were, and are not now, part of the record before this court for review," J.A. 787, correctly concluded that the stated reasons for striking Scott and Brooks were not pretextual and that race did not play an impermissible role in the exercise of those strikes. J.A. 787.

It is appropriate and accurate that the court's analysis and conclusion were based on the record. The case must be decided on the record. Much of the amicus brief filed by The Constitution Project is based on sources outside the record: studies (including its own), newspaper articles, polls and law review articles. Thus, the state respectfully submits that the assertions and references made therein should not be considered as a basis to grant petitioner relief. As stated in *Batson*, the trial court should consider all relevant circumstances. In elaborating, this Court gave as examples: (1) a pattern of strikes against black jurors included in the particular venire and (2) the prosecutor's questions and statements during voir dire and in exercising his challenges. This Court again focused on the record in *Miller-El* when it referred to *Batson's* "rule that discrimination by the prosecutor in selecting the defendant's jury sufficed to establish the constitutional violation." *Miller-El*, 545 U.S. at 236. This court again referred to the record of the case before it in *Miller-El* when it, citing *Batson*, stated, "we accordingly held that a defendant could make out a prima facie case of discriminatory jury

selection by 'the totality of the relevant facts' about a prosecutor's conduct during the defendant's own trial." *Miller-El*, 545 U.S. at 239. Admittedly, *Miller-El* acknowledged that a court may sometimes not be sure whether race-neutral reasons are legitimate if confined within the four corners of a given case unless it looks beyond the case at hand. Id., at 240. However, a reviewing court looking beyond the case at hand would be considering matters not considered by the trial court. Such review could undermine the concept of a reviewing court actually "reviewing" lower court proceedings. Thus, while *Swain's* wide net was not eliminated by *Batson*, *Miller-El*, 545 U.S. at 239, neither was it cast below. Therefore, the free ranging assertions made by amici, having little or no basis in the record and certainly not matters considered by the state trial judge, should not be considered by this Court. Indeed, many of the assertions made by amici, especially the brief filed by Nine Jefferson Parish Ministers, exist nowhere else but in their briefs, insofar as the record before this Court is concerned.

The state submits that whether the reference to O.J. Simpson was proper or not is not at issue in this case. Further, as the comments were made after the *Batson* challenges had been made and ruled upon they should not be retroactively considered because the state trial judge did not have the opportunity to consider them.

Similarly, the state submits that consideration of statements made by the prosecutor after the *Batson* issues are resolved would vitiate the requirement that a timely objection be made to preserve what is perceived to be error. Objections to the state's peremptory challenges could be made virtually any time the state is alleged to exhibit racial bias. Defendants would then attempt to

bolster their appellate arguments on *Batson* issues by pointing to prosecutors' comments made long after the jury selection has been completed and any *Batson* objections ruled upon. Authorizing such a procedure would undermine the state's legitimate interest in requiring a contemporaneous objection. The O.J. Simpson argument should not be considered in this Court's evaluation of the *Batson* issue.

CONCLUSION

Based on the foregoing, the State of Louisiana submits that the ruling of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

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Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Louisiana

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ARGUMENT

The ultimate question of discriminatory intent in this case depends – as it did in this Court's *Miller-El* decisions[1] – upon a determination of the factors to be considered in the analysis adopted in *Batson v. Kentucky*,[2] the legal significance of those factors, the assignment of weight to each, and the inferences and conclusions to be drawn by considering them together in relation to each other. The majority and dissenting justices of the Louisiana Supreme Court were divided over these questions of law. The question before this Court is whether the justices in the majority or the dissenting justices correctly understood and applied the *Miller-El* decisions.

The State asks this Court to limit its *Miller-El* decisions to the facts of Miller-El's case, Br. 11-13, 40, 44, and to treat the issue of discrimination in this case as an issue of fact regarding the credibility of the prosecutor which the trial judge was better positioned to assess than a reviewing court. Br. 6-7. However, the principles carefully explained and applied by this Court in its *Miller-El* decisions are not so limited. This case does not present the "typical peremptory challenge inquiry" involving the very narrow question of "whether counsel's race-neutral reason for a peremptory challenge should be believed." *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion).

Instead, this case presents broader issues of law, such as the State's contentions that, although the prosecutors struck five African Americans to obtain an all-white jury,

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[1] *Miller-El v. Dretke*, 545 U.S. 231 (2005) (*Miller-El II*); *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (*Miller-El I*).

[2] 476 U.S. 79 (1986).

for purposes of the *Batson* analysis they struck only "two out of two," Br. 39; that disparate treatment in the questioning and striking of blacks and whites by prosecutors is of no legal significance because each person is a "unique individual," Br. 43-44; that the backstrike of the first and only African American accepted by the prosecutors was a "neutral act," Br. 37; and that references to the O. J. Simpson case by the prosecutors before trial and in closing argument are not to be considered *at all* in the *Batson* analysis, Br. 36-37, 44-49.

The State also suggests that this Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979), is "instructive" in applying a deferential standard of review to the decisions of the state courts. But the *Jackson* standard for reviewing the sufficiency of evidence to support a conviction[3] has nothing to do with the well-established "clearly erroneous" standard of review adopted in *Hernandez* for the direct review of *Batson* claims. *Hernandez v. New York*, 500 U.S. at 369 (plurality opinion), 372, 375 (O'Connor, J., joined by Scalia, J., concurring). The clearly erroneous standard involves an examination of the "entire record" to determine whether the reviewing court is left with a "definite and firm conviction that a mistake has been committed." *Hernandez*, 500 U.S. at 370 (plurality opinion) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Miller-El I establishes that "deference does not imply abandonment or abdication of judicial review." 537 U.S. at 340. In this case, as in *Miller-El II*, when the relevant

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[3] In *Jackson*, this Court held that the standard for reviewing the sufficiency of evidence to support a conviction was whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 443 U.S. at 319.

factors are properly identified, given the appropriate weight and considered together, as was done by the dissenting justices below, their "direction is too powerful to conclude anything but discrimination." *Miller-El II*, 545 U.S. at 265.

I. THE LOUISIANA SUPREME COURT MAJORITY FAILED TO RECOGNIZE AND PROPERLY APPLY THE PRINCIPLES SET OUT IN THIS COURT'S *MILLER-EL* DECISIONS.

The State has failed to demonstrate that the prosecution was not discriminating when it used its peremptory challenges to prevent African Americans from serving as jurors. It does not address the prosecution's failure to question Elaine Scott and Jeffrey Brooks about the reasons given for striking them and fails to provide meaningful justifications for the prosecution's acceptance of whites to whom the same "reasons" applied as those asserted for striking Scott and Brooks. The State's defense of the backstrike in this case was rejected in *Miller-El II*. Finally, the State asserts for the first time a contention lacking both legal and factual support for excluding the reference to O. J. Simpson in closing argument from the *Batson* analysis.

A. The Strikes of All Five African Americans.

In defense of the Louisiana Supreme Court's "winnowing out" of three black jurors to "ease[ ]" its *Batson* analysis, JA 773-74, the State asserts that because defense counsel did not object at trial to the strikes of the first two African Americans and did not challenge the prosecution's reasons for another on direct appeal, Br. 13-20, that part of the *Batson* analysis "should be considered not as the

state excusing five out of five black prospective jurors, but as excusing two out of two." *Id.* at 39.[4] This is completely at odds with both *Miller-El* decisions, where this Court noted prominently that the State struck ten out of eleven black prospective jurors,[5] even though Miller-El challenged only seven of the ten strikes on direct appeal and six of the ten in his habeas corpus petition. *See Miller-El II*, 545 U.S. at 286 (Thomas, J., dissenting).

The prosecution's use of peremptory strikes to remove all five blacks has probative value because it was unlikely to occur by "happenstance." *Miller El II*, 545 U.S. at 232, 240 (quoting *Miller-El I*, 537 U.S. at 342). In various equal protection contexts, this Court has explained that the greater and the more unlikely the disparity, the more powerful it is as circumstantial evidence of discrimination.[6] Thus, a finding of discrimination is more likely

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[4] After arguing that the disparate impact should be considered as the State striking "two out of two," the State concedes that the strikes of all five blacks are "relevant circumstances" in the *Batson* analysis, but contends they do not support a "free-standing *Batson* claim" and should be given "little, if any weight when considering the *Batson* claims that are properly before the Court." Br. 39. At another point, it argues that the striking of all five blacks was a "neutral fact." Br. 41.

[5] This Court noted the ten of eleven black prospective jurors struck by the State in the second sentence of its decision in *Miller-El I*, 537 U.S. at 326, and in the fourth sentence of its decision in *Miller-El II*, 545 U.S. at 236, and mentioned the "91%" figure repeatedly in the two decisions. *Miller-El II*, 545 U.S. at 240, 266; *Miller-El I*, 537 U.S. at 342, 331.

[6] *See, e.g., Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) (in the zoning context, when a "clear pattern" emerges, the inquiry becomes "relatively easy"). As this Court has explained, the overall impact of an action "is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions." *Reno v. Bossier Parish School Board*, 520 U.S. 471, 487 (1996).

where peremptory strikes produce the "grossly disproportionate exclusion of jurors of one race,"[7] and less likely where the result of strikes does not differ markedly from the racial composition of the venire or the community.[8] There is a substantial difference for purposes of the step three analysis between the prosecution using almost half its peremptory challenges (five of twelve) to prevent all five blacks in the venire from serving on the jury, as petitioner contends, and using only two of twelve to remove only some of the blacks in the venire, as the State argues. The failure of the Louisiana Supreme Court majority to consider and give appropriate weight to the actual statistical disparity was error.

B. The Failure to Question Jurors about the Reasons Asserted for Striking Them.

The State does not address the legal significance of the prosecutors' failure to question Jeffrey Brooks and Elaine Scott about the reasons they gave for striking them, but asks that "petitioner's claim that the state . . . could have asked more questions" be considered in the context of the two days of jury selection during which "a lot fewer questions" were asked than in the five weeks of voir dire in Miller-El's case. Br. 44. What matters, however, is that the prosecutors

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[7] *Ford v. State*, 423 S.E.2d 245, 247 (Ga. 1992) (following remand from this Court in *Ford v. Georgia*, 498 U.S. 411 (1991)) (finding *Batson* violation where prosecution used nine of ten strikes to remove nine of ten blacks in venire). *See also, e.g., Ex Parte Bird*, 594 So. 2d 676 (Ala. 1991); *Flowers v. State*, 947 So. 2d 910, 936 (Miss. 2007).

[8] *See, e.g., United States v. Forbes*, 816 F.2d 1006, 1009 (5th Cir. 1987) (finding no *Batson* violation where prosecution used three of six peremptories to remove blacks, resulting in a jury composed of ten whites and two blacks, a ratio "virtually identical to that on the venire").

had ample opportunity to question Brooks and Scott about the reasons they gave for striking them and engaged in such questioning of white jurors. As the State acknowledges, the lawyers were allowed "to address their questions to individual jurors . . . and to question individual jurors at length" throughout the voir dire. Br. 44 (quoting Pet. Br. 9).

The prosecutors claimed they struck Brooks because he appeared nervous and because, as a student who was missing classes, he might want to "go home quickly." JA 444. The State makes an elaborate argument to this Court that "concern over not fulfilling his graduation requirement *could have been* a cause of great anxiety for Mr. Brooks." Br. 35 (emphasis added). This assertion is based entirely on speculation about what the *law clerk* may have meant when she told the judge that Brooks needed "a three hundred clock hour observation" for his teaching requirement, Br. 33, 35-36 (quoting JA 116), and on how long the trial might last.[9] Brooks never mentioned such a requirement or any concern about graduating.

It would have been easy enough for the prosecutors to ask Brooks and find out whether he actually had any concerns about missing class once the trial judge informed him that his dean did not "see a problem" with his absence for jury service. JA 116. Brooks was one of forty-four prospective jurors out of a group of 100 who came forward after the trial judge asked the group whether the restrictions which

[9] The State argues, "there was no way to know how long the trial would last." Br. 34. However, the prosecutors repeatedly assured jurors it would last about three days. *See* JA 98, 105, 111, 119, 121, 130, 204. When one prospective juror asked to be excused because he would miss half a month of pay, prosecutor Williams responded, "A half a month's pay for missing about three days?" JA 98.

would be imposed upon jurors during trial would result in a hardship for any of them. JA 71-139.[10] (The restrictions were that the jurors would be sequestered, required to stay in a hotel, and not allowed to return to their homes or jobs until the trial was concluded. JA 71-72.[11]) The prosecutors questioned many of the jurors about their situations[12] and whether they would have difficulty

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[10] The response by so many prospective jurors – almost half of the group of 100 – undermines the rationale of the Louisiana Supreme Court majority that because Brooks came forward he was more concerned about his classes than white jurors were concerned about their spouses, children, businesses, and appointments. JA 780-81. That rationale was not even given by the prosecutors as part of their reason for striking Brooks. Two white prospective jurors who came forward in response to the question about hardship, Frances Saracione, JA 78, and Ronald Laws, JA 129-30, served as jurors.

[11] After the first group was questioned, a second group of prospective jurors was brought into the courtroom and asked the same question about whether jury service would pose a hardship. JA 153-54. Once again, a line formed. However, after the questioning of five people, prosecutor Williams announced that there were enough prospective jurors to select a jury without considering any more possible excusals for hardships. JA 161. Williams instructed the judge, "in order to totally protect the record," to put the prospective jurors waiting to be questioned under oath, have them swear they had "certifiable reasons" they could not serve, and "and then just excuse them." JA 162. The judge asked Williams whether to do it one at a time or in a group. Williams told him to do it in a group. JA 163. After the prospective jurors were placed under oath, the judge asked, "Do you all swear that you have a reason for not serving on the jury, that would create an extreme hardship for you? Do all of you swear that?" JA 164-65. After a unanimous affirmative response, the judge excused all of those remaining. JA 164. In short, Williams directed that prospective jurors swear that serving would be an "extreme hardship" regardless of whether it was true, and the judge had them do it.

[12] Questions included whether several prospective jurors would be paid if they missed work to serve as jurors, JA 87, 88, 101, 119; whether another could have work brought to him, JA 99; whether one was the sole supporter of her family, JA 81; whether one could delegate his job

(Continued on following page)

concentrating on the evidence.[13] In contrast, the prosecutors did not ask Brooks a single question when he first told the judge that he was a student and would be missing class, JA 102-04, or when the judge informed Brooks that his dean said his absence would not be a problem, JA 116. Nor did the prosecutors ask Brooks whether he had any desire to get back to observing classes when questioning him and other jurors in the first panel. JA 168-265.

It would have been equally easy for the prosecutors to ask Scott about the two reasons they gave for striking her – their speculation that she had reservations about the death penalty and their assertion, unsupported by the record, that she strongly supported a sentence of life imprisonment[14] – but they did not.

---

responsibilities to someone else, JA 136; and whether one could have someone else feed his aunt's dog, JA 138.

[13] *See* JA 84 (mother of a 12-year-old asked if she would be able to "pay attention"), 88 (bar owner asked if he would be able to "listen to the evidence"), 121 (mother of a school-age child asked if she "would be unable to focus"), 126 (husband questioned regarding concerns about wife), 130 (Ronald Laws, eventual juror, asked if he could "make other arrangements" and "listen to the evidence" despite work and family obligations), 133 (wife who needed to meet her husband when his boat returned asked if she would be "worrying more about him than listening to the evidence"), 139 (mother of a 13-year-old son asked if she would be "worried about things going on outside"), 271-72 (mother asked if she would worry about her children).

[14] The State does not address the lack of support in the record for its assertion that Scott strongly favored a life sentence and asserts that "[i]t cannot be said that the prosecutor in petitioner's trial mischaracterized" any juror's answers. Br. 11. But the prosecutors mischaracterized Scott's answers, asserting that she "was very positive . . . about a life sentence, she was very positive," when in fact she expressed no such sentiments. JA 361-67, 396. *See* Pet. Br. 34-37. The State also asserts that the disparate questioning of whites and blacks was not "anywhere near the level of that in *Miller-El*," Br. 44, but the difference, as the

(Continued on following page)

Miller-El II makes it clear that the Louisiana Supreme Court erred in not recognizing the failure to question these jurors as evidence of discrimination. 545 U.S. at 246. *See also, e.g., Davidson v. Harris*, 30 F.3d 963 (8th Cir. 1994) (*Batson* violation found where party asked no questions to verify its reason); *Splunge v. Clark*, 960 F.2d 705, 708-09 (7th Cir. 1992) (finding discrimination where the prosecution did not ask about its asserted reason beyond a "cursory question"); *Norfolk S. Ry. v. Gideon*, 676 So. 2d 310, 312 (Ala. 1996) (finding *Batson* violation where counsel did not engage in any "meaningful voir dire" about reason); *State v. Slappy*, 522 So. 2d 18, 23 (Fla. 1988) ("utter failure to question two of the challenged jurors on the grounds alleged for bias ... renders the state's explanation immediately suspect").

C. The Acceptance of Similarly Situated White Jurors.

The prosecutors claimed they struck Brooks because they were concerned that he would want to "go home quickly," JA 444, but they accepted white jurors who had just as much reason to want to go home quickly due to important personal or business obligations, *see* Pet. Br. 30-33. The State summarizes the situations of prospective jurors Laws, Burns, Yeager, Sandras, and Donnes, and argues that every juror is an individual and no two are exactly the same. Br. 41-44.[15]

State acknowledges, is that the voir dire in this case lasted less than two days, Br. 44.

[15] The State does not address the prosecution's acceptance of jurors who shared the same characteristics as its reasons for striking Elaine Scott, two of whom served on the jury. *See* Pet. Br. 36-37.

However, the State does not show why any of the jurors it describes would have had any less desire than Brooks to complete their service and get back to their families and livelihoods as soon as possible. For example, while Laws said that he could "make other arrangements," as the State points out, Br. 41, there is no indication that he still did not want to get back as quickly as possible to his wife, who was recovering from surgery; his children, whom he was taking to school every day; and his contracting business so that he could complete construction of two houses that were soon to be occupied. JA 129-30. In all probability, most, if not all, of the jurors wanted to complete their service by the upcoming Labor Day weekend if possible. Yet, as described in Petitioner's principal brief at 31-33, the prosecutors accepted Laws, Burns, Yeager, Sandras, and Donnes, all of whom described obligations and concerns that would cause them to want to complete their service as quickly as possible, while asserting that they struck Brooks for that reason.[16]

Jury service inevitably causes some inconvenience or even disruption in the lives of citizens who are summoned, often with little notice, to leave what they are doing and report to the courthouse. Citizens called for jury service in a capital trial can be expected to be nervous about the awesome responsibility involved and, like most jurors everywhere, to want to return to their lives as soon as they can. The assertion of these almost universal characteristics as

[16] With the benefit of hindsight, the State argues that the defense was likely to strike two of the jurors, Burns and Donnes, as it did. Br. 41-42. But as this Court recognized in *Miller-El II*, the prosecutors could not have known with any degree of certainty how the defense would exercise its challenges. 545 U.S. at 245 n.4.

reasons for striking Brooks was a pretext for discrimination.

D. The Backstrike of Jeffrey Brooks.

Long before this Court's *Miller-El* decisions, Justices Lemmon and Johnson concluded in their dissents in 1999 that prosecutors had accepted Brooks and later used a backstrike to remove him as part of a strategy to discriminate. JA 732 (Lemmon, J., concurring) ("the timing of the Brooks backstrike made the early acceptance of Brooks suspect"); 739 (Johnson, J., dissenting) ("the prosecutor's action in accepting the first African-American seems to have been a tactic"). After this Court's remand for reconsideration in light of *Miller-El II*, Justice Kimball, in a dissent joined by Chief Justice Calogero, agreed with their assessment. JA 791 (Kimball, J., dissenting) (backstrike among circumstances that "*Miller-El* teaches are clearly relevant to the *Batson* analysis"). The majority concluded that the backstrike of Brooks was supported by the reasons asserted by the prosecutors for striking him, JA 779-80, without addressing the possibility that it was used to discriminate.

The State argues that the backstrike is "no more and no less evidence of discriminatory intent than is any other challenge" because it is "statutorily authorized" and "petitioner's counsel exercised two backstrikes." Br. 36-37. However, one of the lessons of the *Miller-El* decisions, recognized by Justice Kimball and the other dissenting justices but not by the majority, is that a statutorily authorized procedure – the jury shuffle in Miller-El's case, which both sides used – can be used by a prosecutor for

discriminatory purposes. *Miller-El II*, 545 U.S. at 253-255, 265; *Miller-El I*, 537 U.S. at 346.

In this case, the prosecutors accepted Brooks after the questioning of the first panel. JA 268. As a result, no *Batson* objection was made when they struck the next two blacks in the venire. JA 345, 400.[17] However, once the defense objected pursuant to *Batson* after the prosecutors used their sixth strike to remove Elaine Scott, JA 401-02, the prosecutors used their next peremptory to backstrike Brooks. JA 443. If the prosecutors had valid reasons for striking Brooks, they would have struck him after the questioning of the first panel. If they wanted to use their backstrikes based upon a comparison of jurors examined early in the process with those questioned later on, they would have waited until jury selection was nearing completion to exercise the backstrike, as they did in backstriking two white jurors after asking and being assured that eleven jurors had been accepted. JA 488-89.

In *Miller-El II*, this Court found that the Court of Appeals erroneously "declined to give much weight to the evidence of racially motivated jury shuffles because 'Miller-El shuffled the jury five times and the prosecutors shuffled the jury only twice.'" *Miller-El II*, 545 U.S. at 255 n.14 (quoting *Miller-El v. Dretke*, 361 F.3d 849, 855 (5th Cir. 2004)). Here, the Louisiana Supreme Court majority failed to give any weight at all to the racially motivated use of the backstrike.

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[17] The State asserts that, unlike *Miller-El II*, no trickery was involved in the questioning of jurors. Br. 12. However, it is obvious that the prosecutors tricked the defense lawyers into not making *Batson* challenges when they struck the first two black jurors.

E. References to the O. J. Simpson Case.

The Louisiana Supreme Court majority concluded that references to the O. J. Simpson case by prosecutor Williams before trial and in closing argument were irrelevant to the issue of discriminatory intent because Williams did not refer "to Simpson's or Snyder's race." JA 787. It also concluded that the reference in closing argument was invited by defense counsel.[18] The dissenting justices concluded that the references were compelling evidence of discriminatory intent. JA 732-33 (Lemmon, J., dissenting), 790 (Kimball, J., joined by Calogero, C.J., dissenting), 801 (Johnson, J., dissenting).

The State does not address the pretrial comments by prosecutor Williams that this was his "O. J. Simpson case" or defend the majority's conclusion that the references had no racial implications. Instead, it asserts a new basis for not considering the reference in closing argument as part of the *Batson* analysis – that the trial judge did not have the opportunity to consider it, Br. 48, because it was "not

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[18] The State defends this conclusion in its brief, arguing that the reference was in response to the defense argument that Snyder was under emotional and mental influences. Br. 45-47. But the State, like the Louisiana Supreme Court majority, does not explain how this allowed the prosecutor to go outside the record and compare Snyder's case to the most racially polarizing case in the country as a reason to give Snyder the death penalty. Louisiana law limits argument by attorneys to "evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." La. C. Crim. Proc. Art. 774 (1998). The State argues that the Simpson case was "historical fact of which the jury would have been aware" and could consider, Br. 45-46, but that it was not something the Louisiana Supreme Court could consider, because it was not part of the record, Br. 47. However, the Louisiana Supreme Court would surely have had the same awareness as the jury.

in existence at the time the *Batson* objections were made and ruled upon," Br. 45.[19]

However, neither the trial court nor the Louisiana Supreme Court majority refused to consider the reference to the O. J. Simpson case in closing argument based on when it was made. Such a ruling would have been indefensible on both the law and the facts. The Louisiana Supreme Court has properly recognized that "comments . . . made in closing argument" may be "relevant under *Miller-El* to prove a party's racial motive in making an earlier peremptory challenge." *Alex v. Rayne Concrete Service*, 951 So. 2d 138, 146 (La. 2007). And the trial court was presented with the argument that Williams "maneuvered the jury around to where it was all white," so that he could make the O. J. Simpson argument, JA 659, before it finally ruled on the *Batson* claim in denying Snyder's motion for a new trial, JA 664-65.

Indeed, the trial court's only opportunity to consider the totality of the circumstances relevant to the *Batson* claim was on the motion for a new trial because it overruled each *Batson* challenge as the jury was being selected and before all the facts had been developed.[20] *See Coulter v.*

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[19] The State also argues that consideration of the reference will encourage defendants to "bolster their appellate arguments on *Batson* issues by pointing to prosecutors' comments made long after the jury selection has been completed." Br. 48-49. Of course, the best way to prevent that would be for prosecutors to refrain from appealing to race at any time.

[20] When the trial judge upheld the strike of Elaine Scott after the questioning of the third panel, JA 401-02, the prosecution had used only three of six strikes to remove blacks and had accepted one black, Jeffrey Brooks. At that time, and at the time the trial judge upheld the backstrike of Brooks after questioning of the fourth panel, JA 443-46,

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Gilmore, 155 F.3d 912, 921 (7th Cir. 1998) (finding *Batson* error where the trial judge failed to consider the totality of the circumstances but instead conducted only a "juror-by-juror inquiry"). However, it appears that the trial court did not take advantage of that opportunity because in denying the motion it said only, "the Court believes that the D.A. explained sufficient race neutral reasons for his challenges." JA 665.

Thus, there was no procedural, legal, or factual reason to exclude the references to O. J. Simpson from "'the totality of the relevant facts'" in determining the prosecution's intent in striking black prospective jurors. *Miller-El II*, 545 U.S. at 239 (quoting *Batson*, 476 U.S. at 94). The Louisiana Supreme Court majority erred by not recognizing and considering the racial implications of the references.

II. THE FINDINGS OF THE LOUISIANA COURT ARE SUBJECT TO CLEAR ERROR REVIEW.

The State confuses the clearly erroneous standard of review, which this Court and lower appellate courts have consistently applied in review of *Batson* claims, with the sufficiency-of-the-evidence standard adopted in *Jackson v. Virginia*, 443 U.S. 307 (1979), and suggests that this

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neither the trial court nor counsel knew that the prosecution would later strike a fifth black, Loretta Walker, JA 447-48; that the prosecution's questioning of white jurors in the fifth and sixth panels would continue to differ from its questioning of Scott and Brooks; and that the prosecution would later accept jurors Yeager, JA 489, Sandras, JA 490, and Laws, JA 549, even though they had as much reason to want to "go home quickly" due to family and work obligations as Brooks might have had due to being a student.

Court's only role in reviewing a *Batson* claim rejected by a state court is "to ask whether any rational trier of fact could have accepted as race-neutral the prosecutor's reasons." Br. 10.

However, as this Court has made clear on numerous occasions, "[a] finding is 'clearly erroneous' when *although there is evidence to support it*, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis added) (cited in *Hernandez*, 500 U.S. at 369 (plurality opinion)). *See also Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (cited in *Batson v. Kentucky*, 476 U.S. at 98); Fed. R. Civ. Pro. 52(a). This Court reaffirmed this standard of review in *Miller-El I*, 537 U.S. at 339-40, and *Rice v. Collins*, 546 U.S. 333, 338 (2006). Federal and state appellate courts regularly apply it in the direct review of *Batson* claims,[21] as the Louisiana Supreme Court majority said it was doing in this case. JA 787-88.

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[21] *See, e.g.*, *United States v. Nelson*, 450 F.3d 1201, 1207, (10th Cir. 2006), *cert. denied*, 127 S. Ct. 326 (2006); *United States v. Hill*, 146 F.3d 337, 341 (6th Cir. 1998); *Davidson v. Harris*, 30 F.3d 963, 966 (8th Cir. 1994); *United States v. Bentley-Smith*, 2 F.3d 1368, 1372-73 (5th Cir. 1993); *Williams v. Chrans*, 957 F.2d 487, 490 (7th Cir. 1992); *United States v. Lewis*, 837 F.2d 415, 417 (9th Cir. 1988); *Gamble v. State*, 357 S.E.2d 792, 794 (Ga. 1987); *People v. Hope*, 589 N.E.2d 503, 506 (Ill. 1992); *Kent v. State*, 675 N.E.2d 332, 340 (Ind. 1996); *Caudill v. Commonwealth*, 120 S.W.3d 635, 657 (Ky. 2003); *State v. McRae*, 494 N.W.2d 252, 254 (Minn. 1992); *Chisolm v. State*, 529 So. 2d 630, 633 (Miss. 1988); *State v. Antwine*, 743 S.W.2d 51, 66 (Mo. 1987); *Libby v. State*, 975 P.2d 833, 839 (Nev. 1999); *State v. Thomas*, 407 S.E.2d 141, 148 (N.C. 1991); *State v. Frazier*, 873 N.E.2d 1263, 1279 (Ohio 2007); *State v. Haigler*, 515 S.E.2d 88, 91 (S.C. 1999); *Whitsey v. State*, 796 S.W.2d 707, 721-26 (Tex. Crim. App. 1989); *State v. Lamon*, 664 N.W.2d 607, 611 (Wis. 2003); *Beartusk v. State*, 6 P.3d 138, 143 (Wyo. 2000).

As the plurality in *Hernandez* observed, 500 U.S. at 367-68, the clearly erroneous standard is consistent with the review this Court has long applied in jury discrimination cases such as *Norris v. Alabama*, 294 U.S. 587, 590 (1935), where this Court "analyze[d] the facts in order that the appropriate enforcement of the federal right may be assured," and *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939), where this Court explained that "when a claim is properly asserted . . . that a citizen whose life is at stake has been denied equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts."

The plurality in *Hernandez* also pointed out that the clearly erroneous standard is applied in other equal protection cases such as *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (affirming holding of Court of Appeals that district court's conclusion that state constitutional provision was not adopted with an intent to discriminate was clearly erroneous); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (examining record and applying clearly erroneous standard to district court's finding that at-large voting system was maintained for discriminatory purposes); and *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 534, 542 (1979) (affirming holding of Court of Appeals that district court's failure to find the intentional operation of a dual school system was clearly erroneous). *Hernandez*, 500 U.S. at 364-65.[22]

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[22] *See also Miller v. Johnson*, 515 U.S. 900, 915 (1995) (concluding that the district court's findings that race was the predominant factor motivating the drawing of a congressional district were not clearly erroneous and examining the record thoroughly "to consider the

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In other contexts as well, this Court has "analyze[d] the facts in order that the appropriate enforcement of the federal right may be assured." *Drope v. Missouri*, 420 U.S. 162, 175 (1975) (citing *Norris*, 294 U.S. at 590). There, this Court unanimously reversed a conviction because the state courts failed "to consider and give proper weight to the record evidence" in determining that Drope was competent for trial. *Id.* at 179.

The ultimate determination of discriminatory intent on this record depends, as in the *Miller-El* cases, upon conclusions to be drawn by collating "facts" that lie in several quite different dimensions. These include the percentages of black and white venirepersons peremptorily struck by the prosecution; the characteristics, other than race, of blacks the prosecution struck and of whites the prosecution did not challenge; the ways in which the prosecution questioned black and white venirepersons; the reasons given by the prosecution for its strikes of blacks, and the extent to which the record supports those reasons; the prosecution's protestations that the strikes were not racially motivated; the prosecution's use of tactical devices such as the backstrike, which can serve a discriminatory function; the prosecution's persistent effort – from pretrial through closing argument – to portray Snyder's case as a local "O. J. Simpson case"; and the differential impact the prosecution's argument that Snyder should not be allowed to "[get] away with it" as Simpson did would have on black and white jurors in the cultural and historical context of Jefferson Parish.

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requirements of the proof necessary to sustain this equal protection challenge").

This is far different from *Hernandez v. New York*, where this Court addressed the "typical peremptory challenge inquiry" in which "the decisive question" is "whether counsel's race-neutral reason for a peremptory challenge should be believed." 500 U.S. at 365 (plurality opinion); *see also id.* at 372 (O'Connor, J., concurring) ("Upon resolution of the factfinding questions, this case is straightforward.").

In this Court's first *Miller-El* decision, it modeled the process for evaluating *Batson* claims on a complex factual record under the Antiterrorism and Effective Death Penalty Act. After "explain[ing] in some detail the extensive evidence concerning the jury selection procedures" in the case, 537 U.S. at 331, the Court held that the Fifth Circuit should have issued a certificate of appealability because the District Court "did not give full consideration to the substantial evidence . . . [that Miller-El] put forth in support of . . . [his] *prima facie* case . . . [but i]nstead . . . accepted without question the state court's evaluation of the demeanor of the prosecutors and jurors in . . . [Miller-El's] trial." *Id.* at 341. On remand, the Fifth Circuit granted a COA but rejected Miller-El's *Batson* claim on the merits in an opinion that fell short of conducting the kind of analysis which this Court had modeled for it in broad strokes. This Court again granted review, analyzed the evidence in careful detail, demonstrated exactly why it was "too powerful to conclude anything but discrimination," *Miller-El II*, 545 U.S. at 265, and granted Miller-El *Batson* relief.

Following this second *Miller El* decision, this Court vacated the Louisiana Supreme Court's judgment in Snyder's case and remanded for reconsideration in light of *Miller-El II*. Like the Fifth Circuit, the Louisiana Supreme

Court majority did not correctly follow this Court's guidance in applying *Batson*'s doctrinal analysis to Snyder's claim. Thus, this Court is called upon again to demonstrate the proper application of constitutional law to the evidence presented here.

CONCLUSION

For the foregoing reasons, in addition to those set forth in Petitioner's principal brief, this Court should reverse the decision of the Louisiana Supreme Court and remand this case with directions that it grant Snyder relief pursuant to *Batson v. Kentucky*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ALLEN SNYDER,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

BRIEF FOR THE CONSTITUTION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Amicus curiae the Constitution Project respectfully submits this brief supporting reversal of the decision of the Louisiana Supreme Court in *State* v. *Snyder*, 942 So. 2d 484 (La. 2006) ("*Snyder III*").[1]

INTEREST OF *AMICUS CURIAE*

The Constitution Project is a bipartisan nonprofit organization that seeks solutions to contemporary constitutional issues through scholarship and public education. The Project's essential mission is to promote constitutional dialogue. It creates bipartisan committees whose members are former government officials, judges, scholars, and other prominent citizens. These committees reach across ideological and partisan lines to craft consensus recommendations for policy reforms. The Project is deeply concerned with the preservation of our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. The Project promotes this Court's role as the ultimate arbiter of the meaning of those constitutional guarantees.

In 2000, the Project convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others with extensive and varied experience in the criminal justice system to examine the current capital punishment system and to recommend ways to ensure that fundamental fairness is guaranteed for all. The Committee's first report, *Mandatory Justice: Eighteen Reforms to the Death Penalty*,[2] was issued

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made any monetary contribution toward the preparation or submission of this brief. This brief was written with the assistance of Desiree Ramirez and Armilla Staley, students in the Death Penalty Clinic at the University of California Berkeley Law School. Letters indicating the parties' consent to the filing of this *amicus* brief have been submitted to the Clerk.

[2] Hereinafter *Mandatory Justice I*, *available at* http://www.constitutionproject.org/pdf/MandatoryJustice1.pdf.

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the following year. In 2006, the Committee released an updated version of its 2001 report and consensus recommendations. *Mandatory Justice: The Death Penalty Revisited*[3] describes 32 reforms aimed at reducing the risk of wrongful capital convictions and executions. Both reports concluded that "the issues of racial neutrality, fairness, and public confidence that racial discrimination plays no role in the [life and death] decisions . . . are among the most important confronting the death penalty system."[4]

The opinion of the Louisiana Supreme Court in *Snyder III*, which reaffirmed the denial of Petitioner's *Batson* challenge after this Court's remand in light of *Miller-El* v. *Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"),[5] implicates at least two interests of the Constitution Project. First, "to help ensure that racial discrimination plays no role in [a jurisdiction's] capital punishment system, and to thereby enhance public confidence in the system,"[6] the Death Penalty Committee's reports recommended "bring[ing] members of all races into every level of the decision-making process."[7] More specifically, the Committee's two reports proposed that "efforts should be redoubled, through [*inter alia*] vigorously enforcing *Batson* v. *Kentucky*, 476 U.S. 79 (1986), . . . to ensure that members of all races are part of . . . petit juries that decide guilt and punishment."[8]

Second, the Project and its Death Penalty Committee are concerned that prosecutors uphold their constitutional responsibilities, including their duty to "seek justice" and

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[3] Hereinafter *Mandatory Justice Revisited*, *available at* http://www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf.

[4] *Mandatory Justice I*, at 25; *Mandatory Justice Penalty Revisited*, at 37-38.

[5] *Snyder* v. *Louisiana*, 545 U.S. 1137 (2005).

[6] *Mandatory Justice I*, at 23; *Mandatory Justice Revisited*, at 35.

[7] *Id.*

[8] *Mandatory Justice I*, at 24; *Mandatory Justice Revisited*, at 37.

adhere to the highest professional standards.[9] Consistent with these objectives, the Committee's two reports proposed, *inter alia*, reforms to "provide a check on broad prosecutorial discretion,"[10] "prevent discrimination from playing a role in the capital-decision making process,"[11] keep the prosecutor "free of the pressure of media attention and political considerations,"[12] and institute policies to improve the accuracy and reliability of the capital punishment process.[13]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has made clear that, at step three of the *Batson* inquiry, a court must assess the credibility of the prosecutor's explanation for a peremptory challenge "in light of all evidence with a bearing on it." *Miller-El II*, 545 U.S. at 252 (citing *Batson*, 476 U.S. at 96-97, and *Miller-El* v. *Cockrell*, 537 U.S. 322, 339 (2003) ("*Miller-El I*")). The importance of this requirement cannot be overstated. As the Court observed in *Miller-El II*, although "'this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause,' . . . [t]he rub has been the practical difficulty of fer-

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[9] *See, e.g., Brady* v. *Maryland*, 373 U.S. 83, 88 n.2 (1963) ("[The prosecutor's] chief business is not to achieve victory but to establish justice." (internal citations omitted)); NAT'L PROSECUTION STANDARDS § 1.1 (National District Attorneys Ass'n 2d ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished."); CRIMINAL JUSTICE PROSECUTION FUNCTION STANDARDS ("PROSECUTION FUNCTION") S. 3-1.2 (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); NAT'L PROSECUTION STANDARDS § 1.5 ("At a minimum, the prosecutor should abide by all applicable provisions of the Rules of Professional Conduct or Code of Professional Responsibility as adopted by the state of his jurisdiction.").

[10] *Mandatory Justice I*, at 27; *Mandatory Justice Revisited*, at 39.

[11] *Id.*

[12] *Mandatory Justice I*, at 53; *Mandatory Justice Revisited*, at 103.

[13] *See Mandatory Justice I*, at 47-54; *Mandatory Justice Revisited*, at 96-107.

reting out discrimination in selections discretionary by nature and subject to a myriad of legitimate influences." 545 U.S. at 238 (quoting *Georgia* v. *McCollum*, 505 U.S. 42, 44 (1992)).

Indeed, there is ample empirical support for the conclusion that lawyers will go to considerable lengths to avoid "the appearance of racial bias," notwithstanding the fact that their peremptory challenges are "consciously and strategically" influenced by racial considerations.[14] "Even in extreme instances of bias—such as the exclusion of every Black member of the venire—. . . it would be relatively easy to generate multiple, race-neutral justifications."[15] Therefore, this Court must firmly reject efforts by lower courts to adjudicate *Batson* challenges on anything less than a full accounting of all the evidence that may bear upon a prosecutor's motives.

In *Snyder III*, a narrow majority of the Louisiana Supreme Court veered far off the course this Court set in *Miller-El II*, failing at step three to adequately "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Batson*, 476 U.S. at 93 (quoting *Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). This Court's characterization of the Fifth Circuit's "'dismissive and strained interpretation'" of the evidence presented by Thomas Miller-El applies equally to the state court's treatment of the evidence presented by Allen Snyder, which, "viewed cumulatively . . . is too powerful to conclude anything but discrimination" was

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[14] Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the* Batson *Challenge Procedure*, 31 Law & Hum. Behav. 261, 263 (June 2007); *id.* at 269 ("[T]his investigation provides clear empirical evidence that a prospective juror's race can influence peremptory challenge use and that self-report justifications are unlikely to be useful for identifying this influence—findings that are strikingly similar in direction as well as magnitude to the conclusions of archival analyses of real peremptory use[.]" (citations omitted)).

[15] *Id.* at 269.

the reason the prosecutor exercised his peremptory challenges to remove all African Americans from the jury. *Miller-El II*, 545 U.S. at 265 (citing *Miller-El I*, 537 U.S. at 344).

This brief emphasizes the unusual, unethical, and unconstitutional nature of the prosecutor's conduct in this case, beginning with his comments to the media comparing Mr. Snyder to O.J. Simpson, and culminating in his rebuttal penalty phase argument referencing the O.J. Simpson case and implicitly urging the jury not to let Mr. Snyder "g[e]t away with it" like O.J. Simpson did. A narrow majority of the Louisiana Supreme Court deviated from this Court's directive on remand and from its *Batson* jurisprudence by failing to acknowledge that this provocative and impermissible conduct was powerful evidence of the prosecutor's discriminatory intent to use his peremptory challenges to purge Mr. Snyder's capital jury of all African Americans. *Snyder III*, 942 So. 2d at 498-500.

So long as *Batson* defines the Equal Protection regime,[16] rigorous insistence on compliance, particularly, as here, where lower courts decline to follow this Court's directives, is a constitutional and public policy imperative.[17] Any-

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[16] Some members of this Court have questioned *Batson*'s continued viability to eliminate race as a factor in jury selection, proposing, instead, that enforcement of the Equal Protection Clause in this aspect of the trial process will only be achieved by the elimination of peremptory challenges. *Batson*, 476 U.S. at 102-103 (Marshall J., concurring); *Miller-El II*, 545 U.S. at 266-267, 269-270, 272-273 (Breyer, J., concurring); *Rice* v. *Collins*, 546 U.S. 333, 342-343 (2006) (Breyer J., with Souter, J., concurring); *see also Swain* v. *Alabama*, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting) ("Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.").

[17] *See Johnson* v. *California*, 545 U.S. 162, 172 (2005) ("'For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but it is at war with our basic concepts of a democratic society

thing other than a reversal of the Louisiana Supreme Court's decision would be a sharp retreat from this Court's *Batson* jurisprudence and particularly from the Court's recent elucidation in *Miller-El I* and *II* of step three of the analysis. The decision of the Louisiana Supreme Court in this case—coming particularly as it does on remand from this Court—undermines public confidence in the prosecutorial function, the jury system, and the principle that redress of constitutional violations can be achieved through the process of judicial review.

STATEMENT OF THE CASE[18]

In June 1994, O.J. Simpson was arrested for the murder of his wife, Nicole Brown Simpson, and Ronald Goldman.[19] An estimated 95 million television viewers[20] watched Los Angeles police pursue Mr. Simpson in a low-speed freeway chase that lasted almost two hours.[21] As discussed in Part I of the argument below, the double murder, Mr. Simpson's arrest, and the Simpson trial precipitated media and public interest that was unprecedented in degree and duration.

Some fourteen months after Mr. Simpson's arrest, on August 16, 1995, Allen Snyder was arrested in Jefferson Parish, Louisiana, for the nonfatal stabbing of his wife, Mary Snyder, and the stabbing death of Howard Wilson. J.A. 1; *State* v. *Snyder*, 750 So. 2d 832, 836 (La. 1999) ("*Snyder I*"). Mr. Snyder was subsequently charged with first-degree murder.

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and a representative government.'" (quoting *Smith* v. *Texas*, 311 U.S. 128, 130 (1940)).

[18] This section sets forth certain facts relevant to the arguments made below. *Amicus curiae* adopts the facts and procedural history set forth in petitioner's brief on the merits.

[19] Seth Mydans, *The Simpson Case: Simpson Is Charged, Chased, Arrested*, N.Y. Times, June 19, 1994, at A1.

[20] Lynn Elber, *Estimated 95 Million Watch Simpson Chase*, S.F. Chron., June 22, 1994, at E3.

[21] *O.J.: Story of the Year*, Seattle Times, Dec. 26, 1995, at E1.

On October 2, 1995, less than two months after Mr. Snyder's arrest, the jury in Mr. Simpson's case acquitted him of all charges.[22] But rather than put an end to the story, the not-guilty verdicts ignited a media firestorm about race and the criminal justice system.[23] As explained in Part I of the argument below, the media coverage of the Simpson case became more racially divisive, and it did not begin to subside for many months.

Between the time of Mr. Snyder's indictment and the commencement of his trial less than a year later on August 27, 1996 (J.A. 16), the prosecutor, Jim Williams, repeatedly and publicly referred to the Snyder case as "his O.J. Simpson case." J.A. 51-52, 57b. In response, the defense moved *in limine* to preclude the prosecutor from making such remarks. J.A. 48-50. As the motion urged (J.A. 49):

> References of the kind [made by the prosecutor to the media] serve no purpose other than as an attempt to confuse and prejudice the jury. Surveys conducted since the verdicts in the O.J. Simpson trial have shown consistently that a large majority of white Americans believe the not guilty verdicts were wrong; many indicate that the verdicts have undermined their faith in the entire jury system. To play upon these fears and prejudices to what will doubtless be an overwhelmingly—if not all—white jury deciding a case with admitted similarities is an appeal to racism at worst and vigilante justice at best, and as such is specifically precluded by Louisiana law.

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[22] *See* Don Melvin, *Not Guilty, O.J. Simpson a Free Man After Verdicts*, Atlanta J.-Const., Oct. 3, 1995, at A1.

[23] *See, e.g.*, Ronald Brownstein, *Simpson Defense's Focus on Racial Identity Further Divides a Nation*, L.A. Times, Oct. 9. 1995, at A1 ("Brownstein"); Martin Gottlieb, *Not Guilty: The Racial Prism; Split at the End, as at the Start*, N.Y. Times, Oct. 4, 1995, at A1 ("Gottlieb"); Leonard Greene, *Racism is Still the Hot Coal the Nation Refuses to Touch*, Boston Herald, Oct. 2, 1995, at 004 ("Greene").

At the hearing on the motion *in limine*, defense counsel argued (J.A. 51-52):

> Mr. Williams has been all over two parishes talking about this is his O.J. Simpson case. And, it's certainly [sic] the similarities are obvious, but they're also very prejudicial. Sixty-something percent of all white people in America think that O.J. Simpson got away with murder. We've got a ninety-five percent jury venire that is white. I believe that such comparisons are irrelevant. They are highly prejudicial and I think that they prevent Mr. Snyder from getting a fair trial, and I would ask that they be precluded in this trial.

The prosecutor did not dispute any of defense counsel's assertions regarding his public statements, the volatile coverage of the O.J. Simpson case, the deep divide between the white and African-American communities over the Simpson verdict, or the grave risk to a fair jury verdict in Mr. Snyder's case if any of "these [racial] fears and prejudices" were exploited to a white or predominately white jury. J.A. 49. Mr. Williams responded by insisting that he knew "what constitutes a mistrial and what is prejudice and what is not." J.A. 52. He protested that he would "never be allowed to refer to anything in connection with the argument of any case if the Court allows this motion." *Id.* Initially, Mr. Williams stated that he would most certainly not refer to the case as "the Jefferson Parish O.J. Simpson court—case" during *voir dire*, but might do so in argument. *Id.* Conceding that such a statement in argument "might be inappropriate," he argued that, at least, the motion was "premature," and assured the trial court that he would not refer to the O.J. Simpson case during the evidentiary portion of the trial. *Id.* His response prompted the following exchange with counsel for Mr. Snyder, Ms. daPonte (J.A. 52-53):

> Ms. daPonte: That's—Judge, evidence is not what I'm worried about. I'm certain he's not going to ask any witness, "don't you think this is a whole lot like the O.J. Simpson case?" I'm concerned

about one of Mr. Williams' famous arguments. And I think—

Mr. Williams: Judge, give me a break. I think—

Ms. daPonte: I'm not finished, Your Honor—

Mr. Williams: Trust me, trust me.

Ms. daPonte then requested that the court order the prosecutor not to "make comparisons in any way with the O.J. Simpson case" and to be "held in contempt if he does that." J.A. 53. Mr. Williams responded (*id.* (emphasis added)):

> Judge, I ask the court to allow me, as an officer of this Court, to conduct this case in the proper manner, but in the way that I see fit. And, I have given the Court my word that I will not, at any time during the course of the taking of evidence *or before the jury in this case*, mention the O.J. Simpson case.

The prosecutor then urged that the motion be denied, repeating his assurance: "I have given the Court my word that I won't do this." *Id.* Defense counsel closed by asking the judge to grant the motion so that the case to be tried would be Mr. Snyder's case, "not the O.J. Simpson case." J.A. 53-54. The court announced that "based upon Mr. Williams' representations," it was denying the motion. J.A. 54.

Immediately before the commencement of *voir dire*, defense counsel filed a motion seeking an order prohibiting all counsel from making comments to the media—pointing out that the prosecutor's repeated, public O.J. Simpson comparisons "abridges Mr. Snyder's right to a fair trial." J.A. 55-57, 57a-57c. Mr. Williams responded that he did not think there had been any showing of prejudice; the sequestered jury would not be exposed to any coverage of Mr. Snyder's trial; he was "currently" disinclined to speak to the press; and, if granted, the order would "bring about a tidal wave of other motions, trying to limit what I can and cannot do, and I don't think it's relevant to this case." J.A. 57a-57c. Mr. Snyder's lawyer told the court that the previous day, a television re-

porter had requested that she comment on "the second O.J. Simpson case that was scheduled to go to trial in Jefferson Parish today." J.A. 57b.[24] She argued that an order was necessary to ensure that Mr. Snyder's case—unlike Mr. Simpson's—was tried in the courtroom and not in the media. *Id.* The prosecutor did not dispute defense counsel's account of the reporter's inquiry. Instead, Mr. Williams protested that he could not keep the press from following him, and told the judge that he would not speak to them during his "case in chief" because it was "against office policy." J.A. 57c. The court denied the motion. *Id.*

As the Louisiana Supreme Court recognized, "[t]he record of the voir dire proceedings reveals that the prosecutor used peremptory challenges to strike every African-American called as a prospective juror who survived challenges for cause. This resulted in an all-white jury for [Mr. Snyder], who is African-American." *Snyder I*, 750 So. 2d at 839. Counsel for Mr. Snyder immediately raised *Batson* challenges to three of the five African-American jurors struck by the prosecutor (J.A. 401, 444, 447),[25] but those challenges were rejected (J.A. 402, 445, 448).

Mr. Snyder was convicted of first-degree murder. J.A. 34. At the sentencing phase of the trial (J.A. 34-38), the defense presented evidence and argued that Mr. Snyder was under extreme emotional distress and, indeed, suicidal at the time of the crimes. *Snyder III*, 942 So. 2d at 498. Specifically, the evidence showed that following the stabbings, Mr.

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[24] The reporter confirmed to defense counsel "that it was the District Attorney's Office which had billed this trial with the by-now infamous moniker and intimated that it was the reference that made the story newsworthy." J.A. 56.

[25] Defense counsel did not make a *Batson* challenge when the prosecutor used his second and fourth peremptory challenges to remove African Americans from the venire, but noted the race of the prospective jurors on the record. J.A. 345, 400-401. When the prosecutor struck the third African American from the venire, the defense made its first *Batson* challenge, and noted that the juror was the third African American subject to a peremptory strike. J.A. 401.

Snyder returned home, barricaded himself inside, and later called the police. *Snyder I*, 750 So. 2d at 836. When officers responded, the furniture was in disarray and had been placed against the doors. Mr. Snyder was inside, curled up in a fetal position, repeating the phrase "[t]hey're coming to get me." *Snyder III*, 942 So. 2d at 498.

Despite the prosecutor's assurances to the court that he would not invoke comparisons to the OJ Simpson case (J.A. 52-53), during rebuttal closing argument, the prosecutor argued to the jury (J.A. 606):

> And it was 12 hours later when [Allen Snyder] called the Kenner Police Department, huddled up, claiming that he was suicidal, barricaded himself in the house. That made me think of something. Made me think of another case, the most famous murder case in the last, in probably recorded history, that all of you all are aware of[.]

Defense counsel objected that the prosecutor was about to mention the O.J. Simpson trial. J.A. 606. The prosecutor responded that he intended to tell the jury that Mr. Snyder "sat for about 12 hours, he huddled and pretended to kill himself, just like O.J. did and just like O.J. got away with it . . . ," and told the trial judge that this argument was "fair comment on something that's common knowledge." J.A. 606-607. The court overruled the objection. J.A. 607. Mr. Williams continued before the jury (*id.* (emphasis added)):

> The most famous murder case, and all of you all have heard about it, happened in California *very, very, very similar to this case.* The perpetrator in that case claimed that he was going to kill himself as he drove in a Ford Bronco and kept the police off of him, and you know what, *he got away with it. Ladies and Gentlemen, is it outside the realm of possibility that that was what [Mr. Snyder] was thinking about when he called in and claimed that he was going to kill himself?*

After deliberating for two and a half hours, the jury returned a death verdict. J.A. 34.

Prior to sentencing, newly retained counsel for Mr. Snyder filed a motion for new trial, arguing, *inter alia*, that the prosecution's use of "strikes on all jurors that were Afro-American" (J.A. 616) and the judge's erroneous *Batson* rulings required vacating the conviction and death sentence (J.A. 638). At the hearing on the motion, defense counsel argued that the prosecutor had exercised his peremptory challenges in order to secure an all-white jury because the prosecutor knew that he could not make the O.J. Simpson comparison to a jury that included even one or two African Americans.[26] J.A. 659. Mr. Snyder's lawyer then described the transparently racial content of the rebuttal argument and its racial directive to the jury (*id.*):

> [Y]ou'd have to be in a cave for the last couple of years to not know, and the prosecutor knew exactly what he was doing, to not know that most white people, this was an all white jury, believed that O.J. Simpson was guilty as hell, and that he was getting away with murder, you know. And it's outrageous for the prosecutor to analogize to that case, to this case, which has nothing to do with it ... [a]nd to hammer this man down, and to get a jury to say, That's right, you know, O.J. Simpson got off, this guy is trying to get off, he's like O.J. Simpson, you know, but we weren't on that jury in California, but we're on a jury here, we can do something about it. And that's totally outrageous.

The trial court denied the motion for new trial (J.A. 665) and formally sentenced Mr. Snyder to death, *Snyder I*, 750 So. 2d at 837.

The Louisiana Supreme Court twice found no error in the trial court's denial of Mr. Snyder's *Batson* claims. *Snyder I*, 750 So. 2d at 842-843; *Snyder III*, 942 So. 2d at 499-500. Its second opinion addressing the *Batson* issue (*Snyder III*) followed this Court's grant of *certiorari*, vacatur of judg-

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[26] *See* La. Code Crim. P. art. 782.

ment, and remand in light of *Miller-El II*. *See Snyder* v. *Louisiana*, 545 U.S. 1137 (2005). On remand, the Louisiana Supreme Court concluded that any inferences of discriminatory intent to be drawn from "the prosecutor's remarks both prior to and subsequent to voir dire" were "no more compelling than other race-neutral inferences to be drawn when one considers the prosecutor's remarks in context." 942 So. 2d at 499. The court determined that the prosecutor's rebuttal argument was race-neutral for two reasons.[27] First, the prosecutor's Simpson analogy was "in direct response" to defense counsel's argument that, among the mitigating circumstances for the jury to consider, were facts relating to "whether Mr. Snyder was under extreme emotional or mental influence at the time of this particular incident." *Id.* at 498-499. Second, the argument did not "refer[] *to Simpson's or Snyder's race.*" *Id.* at 499 (emphasis added).

ARGUMENT

In *Miller-El II*, this Court observed, with regard to the prosecutor's explanations for his strikes of African-American jurors, that, because "[s]ome stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand." 545 U.S. at 240. Therefore, the *Batson* framework permits the defendant to carry his burden of establishing "'purposeful discrimination" by relying on "'all relevant circumstances.'" *Id.*

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[27] In an earlier section of the opinion, the court characterized the prosecutor's remarks as no more than "an indirect reference to the O.J. Simpson case." 942 So. 2d at 498. Later, the majority appeared to concede that the reference to Simpson was unmistakable. *See id.* at 499 ("the remark during rebuttal referred to the fact that Simpson feigned suicidal intent"). Both dissenting opinions had no difficulty discerning the comparisons. *Id.* at 501 (Kimball, J., dissenting) ("the prosecutor clearly referenced the O.J. Simpson case during its rebuttal argument at the penalty phase of the trial"); *id.* at 505 (Johnson, J., dissenting) ("the prosecutor's inflammatory and prejudicial comparison of this case to the O.J. Simpson trial").

(quoting *Batson* v. *Kentucky*, 476 U.S. 79, 96-97 (1986)).[28] In *Miller-El II*, those circumstances included the decades-long "specific policy of systematically excluding blacks from juries" practiced by the Dallas County District Attorney's Office, which the Texas courts and the Fifth Circuit had failed to properly consider. 545 U.S. at 263, 265-266.

Here, the "relevant circumstances" included the prosecutor's racially inflammatory statements to the media before Mr. Snyder's trial comparing the case to the O.J. Simpson case and his argument to the jury analogizing the case to the Simpson case in the face of his promise to the court that he would not do so. Although the prosecutor did not mention O.J. Simpson's race or Mr. Snyder's race in his rebuttal argument, in light of the extensive media coverage regarding the racially divisive nature of the O.J. Simpson case and the prosecutor's prior conduct in this case, there can be no doubt that the prosecutor was well aware that his argument was racially provocative.

The Louisiana Supreme Court declined properly to consider the prosecutor's O.J. Simpson strategy as evidence that he intended to discriminate when he cleared the jury of all African Americans. That was fundamental error.

I. THE PROSECUTOR'S CONDUCT MUST BE CONSIDERED IN LIGHT OF THE EXTENSIVE CONTEMPORANEOUS MEDIA COVERAGE REVEALING THE RACIALLY CHARGED NATURE OF THE O.J. SIMPSON CASE

The Louisiana Supreme Court failed to consider the context in which the prosecutor (1) made repeated comments to the media about the O.J. Simpson case before trial, (2) struck all five qualified African-American jurors, and

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[28] Although this language refers specifically to the evidence to be considered at step one in raising an inference of discrimination, *Miller-El II* affirmed that at step three of the inquiry the judge must "assess the plausibility" of the prosecutor's reasons for his strike "in light of all evidence with a bearing on it." 545 U.S. at 252. Also, *Miller-El I* specifically makes the point that the evidence supporting a *prima facie* case should be considered at step three of the *Batson* analysis. 537 U.S. at 340-341.

then (3) referenced the Simpson case in his argument to the all-white jury he had selected. As Justice Kimball observed in her dissent, "voir dire began against a backdrop of the issues of race and prejudice." 942 So. 2d at 501 (Kimball, J., dissenting).

The press accounts of the O.J. Simpson case are relevant to the *Batson* inquiry in at least two respects: (1) the scope and duration of the coverage was extraordinary; and (2) the content of the stories became markedly more racially divisive after the verdict in October 1995. In her motion and argument at the hearing to preclude reference to O.J. Simpson during the trial, defense counsel emphasized how dramatically the local white and black communities were polarized over O.J. Simpson's acquittal. J.A. 49, 52-54. In the motion for new trial, Mr. Snyder's counsel made the same point, arguing that the prosecutor had purged the jury of African Americans in order to exploit these racial divisions through his O.J. Simpson comments during his rebuttal argument. J.A. 658-659.

Justice Johnson's dissent correctly identified the "nationwide media focus on O.J. Simpson." 942 So. 2d at 506. According to *The Atlanta Journal-Constitution*, the Simpson trial was "the most publicized trial of the century."[29] *The Chicago Sun-Times* called it "the most closely watched murder trial in the nation's history."[30] Nearly every major newspaper in the United States, including *The New York Times*, *The Washington Post*, *USA Today*, and *The Los Angeles Times*, called Mr. Simpson's case "the trial of the century."[31]

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[29] Betsy White, *School Watch: Class Doesn't Think Simpson is One for the Books*, Atlanta J.-Const., Oct. 10, 1995, at 3E.

[30] Alex Rodriguez, *A City's Silence Turns into Joy and Disbelief*, Chi. Sun-Times, Oct. 4, 1995, at SS10.

[31] *The Simpson Verdict*, N.Y. Times, Oct. 4, 1995, at A20; Saundra Torry, *The Verdict Is in: These Forecasters Didn't Fare Too Well*, Wash. Post, Oct. 9, 1995, at F7 ("Torry"); Tony Mauro, *Simpson Free: Prosecutors 'Ran from Their Evidence,'* USA Today, Oct. 4, 1995, at 1A

This was as true in Jefferson Parish as it was elsewhere in the United States. *The Times-Picayune*, the New Orleans-based newspaper that covers and serves Jefferson Parish, also referred to the Simpson trial as the "Trial of [the] Century."[32] A Westlaw search of national newspapers during the period between the Simpson verdict and the start of Mr. Snyder's trial revealed over 5,065 articles about the Simpson case.[33]

Much of the press emphasized that the Simpson trial was "one of the most racially divisive trials in our history."[34] As *The Los Angeles Times* reported only ten months prior to Mr. Snyder's trial:

> [T]he explicit nature of the defense's appeal to racial solidarity—and the apparent responsiveness of the predominantly black jury to the defense claim that Simpson was the victim of a vast, racially motivated police conspiracy—has clearly stained the verdict in the eyes of most white Americans. The stunning pictures of blacks cheering while whites muttered or choked back tears when the verdict

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("Mauro"); Sheryl Stolberg, *The Simpson Legacy: Just Under the Skin, Will We Ever Get Along?* L.A. Times, Oct. 10, 1995, at S3 ("Stolberg").

[32] *Readers Respond to Verdict in "Trial of Century,"* Times-Picayune, Oct. 5, 1995, at A14.

[33] The Westlaw search was performed on August 20, 2007, using the search term "OJ Simpson" appearing in the title line, and restricting the search to the time period between October 3, 1995 and August 26, 1996. A similar Westlaw search of the New Orleans *Times-Picayune* identified 40 articles citing to O.J. Simpson in the title.

[34] Greene, *supra*, at 004. A number of legal commentators shared this view of the trial and the outcome. *See, e.g.*, Robert J. Cottrol, *Perceptions and Decision Making: Racial Perspectives: Through a Glass Diversely: the O.J. Simpson Trial as Racial Rorschach Test*, 67 U. Colo. L. Rev. 909, 913 (1996) ("The selection of a predominately black jury led to speculation from the very beginning that the jurors would somehow be derelict in their duty .... And indeed, in the post-verdict milieu, the immediate public reaction was that jury nullification did occur; that the verdict was not justified[.]").

> was announced chillingly captured the widening separation of interests that increasingly defines American life in the 1990s.[35]

Newspapers across the country ran story after story about the racially polarized reactions to the verdict.[36] Locally, *The Times-Picayune* reported on the "the cheers and whistles from [a] mostly African-American group that greeted O.J. Simpson's acquittal," in contrast to the "stony silence" at a local eatery "popular with lawyers and other white professionals."[37] One local businessman was quoted: "There's no other way to put it. He's got away with murder."[38] Soon after the Simpson verdict was announced, *The Louisiana Weekly*, a local African-American newspaper, ran articles that characterized the trial as "American racism on trial," and observed that the trial demonstrated the ways in which "America is infected, from the bottom to the top, with the deadly disease of racism."[39]

National polls were also unanimous in their findings that the Simpson trial sparked reactions that varied significantly according to race. A poll undertaken by *The Washington Post* shortly after O.J. Simpson's acquittal found that

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[35] Brownstein, *supra*, at A1.

[36] *See, e.g., Not Guilty; BR-area Reactions Range From Cheers To Disbelief*, The Advocate (Baton Rouge), Oct. 4, 1995, at 1A ("race . . . appeared to influence . . . individuals' reactions"); Gottlieb, *supra*, at A1 ("The scene . . . was repeated in thousands of different settings across the country yesterday, with reactions that seemed often to be shaped by race—especially by race[.]").

[37] John Pope, *Some in N.O. Elated, Some Stunned*, Times-Picayune, Oct. 4. 1995, at A4 ("Pope").

[38] *Id.*

[39] C.C. Campbell-Rock, Editorial, *The People vs. O.J.: Simpson American Racism on Trial*, La. Wkly., Sept. 11-17, 1995, at A6 (discussing Simpson's innocence and observing all evidence was circumstantial); Earl Ofari Hutchinson, *Why White America Won't Accept the Simpson Verdict*, La. Wkly., Oct. 23-29, 1995, at A5 (criticizing the apparent presumption of "white America" that African-American jurors reflexively acquit African-American defendants).

85 percent of African Americans agreed with the "not guilty" verdict, while just 34 percent of whites agreed with the verdict.[40] In May of 1996, three months prior to Mr. Snyder's trial, a Gallup poll found that 80 percent of whites believed that the charges against O.J. Simpson were true, as compared to 34 percent of African Americans. The poll also found that 79 percent of whites, compared to 36 percent of African Americans, were unsympathetic towards O.J. Simpson.[41] A poll by *The Los Angeles Times* summed up the general sentiment about the Simpson trial: "Americans overwhelmingly believe that race loomed large as an issue in the trial—and inappropriately so."[42]

The racially charged response to the O.J. Simpson verdict made it an ideal vehicle for injecting race into Mr. Snyder's trial without expressly mentioning it. Social science literature is replete with evidence that, today, due to the widespread acceptance of the norm of equality, racial messages are more often implicit than explicit.[43] The use of analogies—such as the prosecutor's O.J. Simpson comparisons—to communicate racially charged messages is therefore common.[44]

"'[D]ominative racists,' persons who express bigotry and hatred openly, are less common than they were twenty-five years ago, they have been replaced, in substantial

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[40] Richard Morin, *Poll Reflects Division Over Simpson Case; Trial Damaged Image of Courts; Races Agree*, Wash. Post, Oct. 8, 1995, at A31, A34; *see also* Jerelyn Eddings, *Black & White In America: Racial Aspects Of O.J. Simpson Case Verdict*, U.S. News & World Rep., Oct. 16, 1995, at 32 (U.S. News survey taken after verdict found that 62 percent of whites still thought O.J. Simpson was guilty as compared to 55 percent of blacks who agreed with the jury that he was not.).

[41] Frank Newport, *Americans Still Think O.J. Simpson Guilty*, Gallup Poll Monthly, Issue 386 (May 1996).

[42] Cathleen Decker & Sheryl Stolberg, *Half of Americans Disagree With Verdict*, L.A. Times, Oct. 4, 1995, at A1.

[43] *See* Teun A. Van Dijk, *Communicating Racism: Ethnic Prejudice in Thought and Talk* 224-226 (1987).

[44] *Id.* at 90-91.

measure, by closet or 'aversive' racists, persons who continue to hold negative stereotypes of minorities and wish to avoid them."[45] Moreover, "[t]here is an intrinsically collective or group-based dimension to racial prejudice generally, and to modern issues of racial politics in specific"[46] that influences how individuals think, what motivates them and how they behave.[47] In the post-Civil Rights era, "institutionalized racial inequalities" have been replaced by "persistent negative stereotyping of Black Americans" and views "substantially rooted in perceptions of threat and protection of collective group privileges."[48]

In her motion to prohibit the prosecutor from making comparisons to O.J. Simpson before the jury, defense counsel correctly identified the "fears and prejudices" among the white community that had been exacerbated by Mr. Simpson's acquittal. R. 160.[49] It is against this backdrop that the prosecutor's references to O.J. Simpson must be considered.

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[45] *See* Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 Wm. & Mary L. Rev. 21, 75 (1993).

[46] Lawrence D. Bobo, *Prejudice as Group Position: Microfoundations of a Sociological Approach to Racism and Race Relations*, 55 J. Soc. Issues 445, 448 (1999).

[47] *Id.* at 448-450.

[48] *Id.* at 464; *see also* Thomas F. Pettigrew, *The Nature of Modern Racism in the United States*, 2 Revue Internationale de Psychologie Sociale 291, 297-298 (1989).

[49] The racially charged news stories about the Simpson case were consistent with the larger picture of how the media cover crime and, particularly, how the media report on violent crime. *See generally*, Robert M. Entman, *Blacks in the News: Television, Modern Racism and Cultural Change*, 69 Journalism Q. 341, 341-361 (Summer 1992). "Because most people do not have direct experience with the serious violent crimes that they most fear, the role of the media in generating such fear becomes particularly important." Margaret T. Gordon & Linda Heath, *The News Business, Crime, and Fear*, in *Agenda Setting: Readings on Media, Public Opinion, and Policymaking* 71, 72 (David L. Protess & Maxwell McCombs eds., 1991). Research conducted in 1993 and 1994 in Chicago revealed that "[r]acial representation on television ... does not appear to match crime statistics." Robert M. Entman & Andrew Rojecki, *The Black*

II. THE PROSECUTOR'S REPEATED REFERENCES TO O.J. SIMPSON IN STATEMENTS TO THE MEDIA EVIDENCE HIS DISCRIMINATORY INTENT IN STRIKING ALL AFRICAN AMERICANS FROM MR. SNYDER'S JURY

This Court has repeatedly affirmed that the constitutional duty of prosecutors differs from that of other lawyers:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[50]

Federal and state judiciaries have also adopted and applied this definition of the prosecutor's mandate.[51] National and state bar associations, as well the prosecution bar, have incorporated this overarching constitutional principle into a

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Image in the White Mind: Media and Race in America 81 (2000). The research concluded that the over-representation of African-American suspects, the under-representation of African-American victims, and the over-representation of white victims in local news worsened negative stereotyping of African Americans by whites, and might focus on African Americans the "anxiety and hostility" caused by televised violence. *Id.* at 81-82.

[50] *Berger* v. *United States*, 295 U.S. 78, 88 (1935); *see also Viereck* v. *United States*, 318 U.S. 236, 248 (1943) ("It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (internal quotation marks and citations omitted)); *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

[51] *See, e.g.*, *Hodge* v. *Hurley*, 426 F.3d 368, 376 (6th Cir. 2005); *United States* v. *Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993); *United States ex rel. Lusterino* v. *Dros*, 260 F. Supp. 13, 17 (S.D.N.Y. 1966); *State* v. *Barfield*, 723 N.W.2d 303, 312-313 (Neb. 2006); *Maretick* v. *Jarrett*, 62 P.3d 120, 125 (Ariz. 2003); *State* v. *Pabst*, 996 P.2d 321, 326 (Kan. 2000).

range of ethical rules and standards addressing the prosecutor's unique role in the administration of criminal justice.[52]

Mr. Williams first breached his ethical obligations before Mr. Snyder's trial even began. In the context of the unrelenting and racially divisive media coverage of the O.J. Simpson trial discussed in Part I above, the prosecutor's remarks to the local press comparing Mr. Snyder's case to that of O.J. Simpson (J.A. 55, 57a-57d) were just the types of prejudicial statements prohibited by applicable professional standards. His comments to the media violated standards prohibiting prosecutors from making "extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."[53] The American Bar Association added Rule 3.8(g) to the Model Rules of Professional Conduct in recognition that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an ad-

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[52] MODEL RULES OF PROF'L CONDUCT ("MODEL RULES") (1983) R. 8.4(d) (a lawyer is prohibited from "engag[ing] in conduct that is prejudicial to the administration of justice"); *id.* R. 8.4 cmt. [4] ("Lawyers holding public office assume legal responsibilities going beyond those of other citizens."); *accord* LA. RULES OF PROF'L CONDUCT R. 8.4(c)-(d); PROSECUTION FUNCTION S. 3-1.2 (the prosecutor is an "administrator of justice" and "officer of the court," whose duty is "to seek justice, not merely to convict"); *id.* S. 3-1.2 cmt. ("The prosecutor's obligation is ... to guard the rights of the accused," he has been described as a "'minister-of-justice,'" who "occup[ies] a quasi-judicial position."); NAT'L PROSECUTION STANDARDS § 1.1 ("The primary responsibility of prosecution is to see that justice is accomplished.").

[53] MODEL RULES R. 3.8(g); *see also* LA. RULES OF PROF'L CONDUCT R. 3.8(f) (same). The comments to Model Rule 3.6 (prohibiting attorneys from making extrajudicial statements that may prejudice the trial) identify "certain subjects which are more likely than not to have a material prejudicial effect on a proceeding ... particularly when they refer to ... a criminal matter." MODEL RULES R. 3.6 cmt. Those subjects include "the character ... of a party," *id.*, "any opinion as to the guilt or innocence of a defendant," *id.*, and "information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence and that would, if disclosed, create a substantial risk of prejudicing an impartial trial," *id.* The prosecutor's comments to the media clearly fall within one or more of these categories.

vocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[54]

Although Mr. Snyder argued to the Louisiana Supreme Court that the prosecutor's statements to the media regarding O.J. Simpson were evidence of his intent to strike African Americans from the jury, the Louisiana Supreme Court failed altogether to address this argument on remand. That was error. Evidence that the prosecutor had already begun to inject racial bias into this case before the trial began was part of the "relevant circumstances" the court was required under *Miller-El II* to consider.

III. The Prosecutor's Misleading, Unethical Comparison Of Mr. Snyder To O.J. Simpson In His Rebuttal Argument Is Compelling Evidence Of Discriminatory Intent

"The Constitution prohibits racially biased prosecutorial arguments." *McCleskey* v. *Kemp*, 481 U.S. 279, 310 (1987).[55] The prosecutor's O.J. Simpson comparisons in his rebuttal argument were exactly the type of racial arguments condemned by the Court and compelling evidence of the prosecutor's intent to achieve a categorical exclusion from the jury of all qualified African Americans through the exercise of his peremptory challenges.

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[54] Model Rules R. 3.8(g) cmt. [1]; *see also* Nat'l Prosecution Standards § 33.1 (beyond limited information such as the identity of a suspect, circumstances of the arrest, and the existence of "competent evidence," prosecutors are only permitted to release additional information that would, *inter alia*, "dispel widespread rumor or unrest, or promote confidence in the criminal justice system").

[55] It is well settled that the jury is a criminal defendant's fundamental "protection of life and liberty against race or color prejudice." *Strauder* v. *West Virginia*, 100 U.S. 303, 309 (1879). As Judge Jerome Frank wrote in his dissent in *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631 (2d Cir. 1946), "[a] keen observer has said that 'next to perjury, prejudice is the main cause of miscarriages of justice.'" *Id.* at 659 (Frank, J., dissenting) (internal citations omitted).

"It blinks reality to deny" that the prosecutor's reference to O.J. Simpson at the penalty phase was a deliberate and improper appeal to racial prejudice.[56] Yet the Louisiana Supreme Court dismissed the prosecutor's argument as race-neutral. 942 So. 2d at 499. The court concluded that the remark was a proper rebuttal of Mr. Snyder's contention that he was suicidal following the murder and noted that the prosecutor did not "refer[] *to Simpson's or Snyder's race.*" *Id.* (emphasis added). That explanation simply is untenable.

It could not have escaped this all-white jury, as it would not have escaped a jury of any racial composition, that O.J. Simpson and Mr. Snyder are both African American. And in light of the media coverage of the racially divisive nature of the Simpson case, the potential effect of the Simpson analogy was obvious. In response to defense counsel's objection to the Simpson comparisons, Mr. Williams told the trial judge that his argument was "fair comment on something that's common knowledge." J.A. 607. Indeed, the analogy was "common knowledge" and more. The prosecutor seized upon two of the most highly publicized aspects of the O.J. Simpson case—Simpson's behavior prior to his arrest and his acquittal. *Id.* The latter certainly was the most racially divisive event in the case—and in recent American history.[57] This was unquestionably improper.[58]

The prosecutor would have been well within bounds had he relied on evidence before the jury to rebut defense counsel's assertions that Mr. Snyder was under extreme emotional distress at the time of the crime and was suicidal at

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[56] *Miller-El II*, 545 U.S. at 266 ("It blinks reality to deny that the [prosecutor] struck [two jurors] . . . because they were black.").

[57] *See, e.g., The Simpson Verdict*, N.Y. Times, Oct. 4, 1995, at A20; Torry, *supra*; Mauro, *supra*; Stolberg, *supra*.

[58] "Where the jury's predisposition against some particular segment of society is exploited to stigmatize the accused . . . such argument clearly trespasses the bounds of reasonable inference or fair comment on the evidence." PROSECUTION FUNCTION S. 3-5.8 cmt.

the time of his arrest.[59] But he did not. The prosecutor's comparisons to O.J. Simpson were manifestly an attempt to divert the jury from its duty to render a verdict according to the evidence and the law.

The prosecutor's points were straightforward: (1) Allen Snyder had feigned suicidal intent, as had O.J. Simpson; (2) O.J. Simpson's ploy resulted, unjustly, in an acquittal by a jury; but (3) this jury should not allow Mr. Snyder to "g[e]t away with it," as O.J. Simpson had. J.A. 606-607; R. 1592-1593. The fact is, however, that Allen Snyder could not have been mimicking O.J. Simpson in the hope of obtaining an acquittal because Simpson was not acquitted until nearly two months after Mr. Snyder's arrest.[60] Moreover, at the time the prosecutor delivered his rebuttal argument, Mr. Snyder had already been convicted of capital murder. He faced a sentence of death or life without possibility of parole, and could not "g[e]t away" with anything. However, the all-white jury understood the message: anything less than a death sentence would allow Allen Snyder to "g[e]t away" with murder. Although this fact was ignored by the majority,[61] it did not escape Justice Johnson:[62]

> The prosecutor had no need to make reference to this defendant not getting away with murder during the penalty phase of the trial. At this point, the defendant had already been convicted of the crime, so there was nothing for him to 'get away with.' The prosecutor utilized the O.J. Simpson verdict to

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[59] *See, e.g., State* v. *Smith*, 554 So. 2d 676, 681 (La. 1989), *overruled on other grounds by State* v. *Taylor*, 669 So. 2d 364 (La. 1996); *see also* La. Code Crim. P. art. 774 (providing that "[t]he argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case").

[60] *See, e.g.*, Gottlieb, *supra*, at A1; Pope, *supra*, at A4.

[61] *Snyder I*, 750 So. 2d at 842, 845-846; *Snyder III*, 942 So. 2d at 499.

[62] *Snyder I*, 750 So. 2d at 867 (Johnson, J., dissenting); *Snyder III*, 942 So. 2d at 506 (Johnson, J., dissenting).

> racially inflame the jury's passion to sentence this defendant to death. Such tactics leave no doubt in my mind that the prosecutor had a racially discriminatory purpose for excluding the African-American jurors.

The prosecutor's O.J. Simpson comparison was even more egregious in light of his promise to the trial court that he would make no reference to Simpson before the jury. In making this misrepresentation to the trial judge, the prosecutor breached his "unqualified duty of scrupulous candor that rests upon government counsel." *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 358 (1963); *see also Burns* v. *Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994) (noting that the "duty of candor goes beyond the moral duty imposed on counsel by ethical codes or good conscience").[63]

Justices Lemmon and Johnson concluded in separate dissenting opinions in *Snyder I* that "the prosecutor's intention to utilize racial bias became crystal clear when he commented during closing argument in the penalty phase that O.J. Simpson 'got away with it.'" 750 So. 2d at 864 (Lemmon, J., concurring and dissenting in part); *see also id.* at 867 (Johnson J., dissenting) ("The prosecutor utilized the O.J.

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[63] The Model Rules impose a duty of candor on all attorneys. Rule 3.4(e) prohibits trial counsel from "allud[ing] to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence" as well as offering his "personal opinion as to the justness of a cause," including "the guilt or innocence of an accused." MODEL RULES R. 3.4(e); *see also* LA. RULES OF PROF'L CONDUCT R. 3.4(e) (In trial, lawyers shall not, "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . or state a personal opinion as to the justness of a cause . . . or the guilt or innocence of an accused."); PROSECUTION FUNCTION S. 3-2.8(a) (providing that "[a] prosecutor should not intentionally misrepresent matters of fact or law to the court"); *id.* S. 3-12.8(a) cmt. ("It is fundamental that in relations with the court, the prosecutor must be scrupulously candid and truthful in his or her representations in respect to any matter before the court."); NAT'L PROSECUTION STANDARDS § 23.1 (providing that "at all times," prosecutors must maintain "[p]roper respect for the judicial system and appropriate respect for the court").

Simpson verdict to racially inflame the jury's passion to sentence this defendant to death. Such tactics leave no doubt in my mind that the prosecutor had a racially discriminatory purpose for excluding the African-American jurors."). Justices Lemmon and Johnson were correct.

CONCLUSION

For the foregoing reasons, the judgment of the Louisiana Supreme Court should be vacated.

Respectfully submitted,

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No. 06-10119

IN THE
Supreme Court of the United States

ALLEN SNYDER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

BRIEF OF NINE JEFFERSON PARISH MINISTERS AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI[1]

Amici are ministers of African-American churches in and near Jefferson Parish, Louisiana. *Amici* are:

Pastor Gilbert Barnes
Rock of Ages Missionary Baptist Church
Marrero, LA

Elder Warren L. Buchanan
Pastor of Berea Church of God in Christ
Harvey, LA

Elder Lee Franklin
Pastor of True Vine Church of God in Christ
Westwego, LA

Rev. Nathaniel Jimcoily[2]
Pastor of Mt. Olive Baptist Church
New Orleans, LA

Rev. Roy McDaniel
Pastor of Liberty Faith Baptist Church
Marrero, LA

Pastor Arthur Piper, Sr.
New Hope Baptist Church
Gretna, LA

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[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their congregants, or their counsel made a monetary contribution to this brief.

[2] Although his church is in Algiers, a part of New Orleans directly adjacent to Jefferson Parish, Reverend Jimcoily is a resident of Jefferson Parish, as are many of his congregants.

Pastor Fred T. Porter
Cypress Grove Baptist Church
Marrero, LA

Bishop Joan Powell
Senior Pastor of Lovetouch Ministries
Gretna, LA

Elder Johnny Victor
Pastor of Avondale Church of God in Christ
Westwego, LA

Amici submit this brief on their own behalf and on behalf of their congregants. *Amici* and their congregants not only worship in Jefferson Parish; they live, work, vote, volunteer, recreate and raise their families there. Within Jefferson Parish's courts, *amici* and their congregants have been complainants, witnesses, plaintiffs, civil and criminal defendants, and citizens reporting for jury service. Unfortunately, however, the frequent use of peremptory challenges to exclude African Americans from criminal jury service has greatly undermined *amici*'s confidence in Jefferson Parish's criminal justice system. *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986) (noting this consequence of the State's racial discrimination during jury selection).

For that reason and others, *amici* urge this Court to enforce the Fourteenth Amendment's Equal Protection Clause in Jefferson Parish and to reaffirm that prosecutors may not use peremptory strikes in a racially discriminatory manner. Given their longstanding interest in both the well being of Jefferson Parish's African-American community and the legitimacy and fairness of the parish's court system, the proper resolution of this case presents a matter of substantial importance to *amici* and their congregants.

STATEMENT OF THE CASE

In Allen Snyder's 1996 capital murder trial, "the State's use of five of its peremptory challenges to strike African-American prospective jurors who survived challenges for cause resulted in [Snyder's] being tried by an all-white jury." *State v. Snyder*, 942 So. 2d 484, 492 (La. 2006). Over defense objection, and despite guarantees by the prosecutor that he would not continue his pretrial invocations of O.J. Simpson in front of the jury, J.A. 49-56, the prosecutor argued for a death sentence by comparing Snyder to Simpson, "who got away with it." J.A. 606-07. The jury voted that Snyder should be sentenced to death.

A more detailed recitation of the facts and the procedural posture of the case are contained in the party briefs.

SUMMARY OF ARGUMENT

Snyder's all-white jury resulted from the prosecutor's use of peremptory strikes to exclude each and every eligible African-American venireperson. Representing African Americans across Jefferson Parish, *amici* know well the sting of racial discrimination in Jefferson Parish government, and during jury selection in particular. What happened in this case was not unique. As *amici* demonstrate, the Jefferson Parish District Attorney's Office has a historical record of racial discrimination and animus in capital jury selection. The elimination of racial discrimination from the justice system is necessary to ensure that citizens receive a fundamentally fair trial, and to ensure that the criminal justice system itself does not fall into disrepute.

As this Court stated long ago, "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those

classes the full enjoyment of that protection which others enjoy." *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879); *see also Miller-El v. Dretke*, 545 U.S. 231, 237 (2005) (quoting *Strauder*). "[R]epresentation of [a] defendant's race on [his or her] jury may help to overcome racial bias and provide the defendant with a better chance of having a fair trial." *Georgia v. McCollum*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring); *cf. Edmonson v. Leesville Concrete Co. Inc.*, 500 U.S. 614, 628 (1991) (finding that discrimination in the courtroom "raises serious questions as to the fairness of the proceedings conducted there"). A prosecutor's racially discriminatory use of peremptory strikes also harms the individual jurors excluded due to their race *and* the community, which loses confidence in a system in which racial discrimination is tolerated. *See J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994); *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

Consistently recognizing these harmful consequences, this Court has exerted "unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn." *Batson*, 476 U.S. at 85. *Batson* teaches that identifying, and therefore preventing, such discrimination requires an examination of "'all of the relevant circumstances.'" *Miller-El*, 545 U.S. at 240 (quoting *Batson*, 476 U.S. at 96-97).

The following circumstances provide important context for Snyder's *Batson* claim: 1) the Jefferson Parish District Attorney's historical use of peremptory challenges to exclude most eligible African-American venirepersons from capital murder trials, including numerous trials where all or nearly all eligible African-American venirepersons were excluded; 2) the Jefferson Parish District Attorney's history of racially offensive behavior regarding capital cases; and 3)

well-known evidence of troubling racial attitudes held by a substantial portion of white people in Jefferson Parish which were known to the prosecutor when he compared Snyder to the recently-acquitted Simpson in his argument for the death penalty, and which made it more likely that an all-white jury would be receptive to this inflammatory argument.

Amici provide this context out of concerns both for African Americans tried in Jefferson Parish and for those who, though qualified, were prevented from participating "in the administration of the law[] as jurors." *Strauder*, 100 U.S. at 308. *Amici* present the grave concerns of a community which has become increasingly cynical about the fairness and legitimacy of the criminal justice system.

ARGUMENT

ENFORCEMENT OF *BATSON* AND *SWAIN*[3] IS ESSENTIAL TO THE PARTICIPATION OF AFRICAN AMERICANS IN THE CRIMINAL COURTS OF JEFFERSON PARISH AND THE CREDIBILITY AND LEGITIMACY OF THE COURTS IN THE BLACK COMMUNITY.

Service on juries has been described by this Court as an essential component of citizenship. *Powers v. Ohio*, 499 U.S. 400 (1991) (noting that "jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life."). "Despite the clarity" of this Court's "commands to eliminate the taint of racial discrimination in the administration of justice, allegations of bias in the jury selection process persist." *Id.* at 400-401. Because this observation unfortunately remains

[3] *Swain v. Alabama*, 380 U.S. 202 (1965).

accurate in Jefferson Parish, the legitimacy of the courts among the African American community is in jeopardy.

A. Jefferson Parish Prosecutors Have Long Used Peremptory Strikes to Keep Capital Murder Juries All-White or Nearly All-White.

In *Swain v. Alabama*, 380 U.S. 202, 223-24 (1965), this Court held that a defendant could demonstrate that a prosecutor's use of peremptory strikes were racially discriminatory, and therefore prohibited under the Equal Protection Clause, by showing a prosecutor's longstanding pattern of racial discrimination "in case after case." In *Batson*, 476 U.S. at 92-93, the Court found *Swain*'s burden too high and held that a defendant could make out a prima facie case of discriminatory jury selection by showing a prosecutor's discriminatory conduct in defendant's own trial.

Under *Batson*, when a defendant makes out a prima facie case of discrimination, the prosecutor must come forward with race-neutral reasons for exercising the challenged peremptory strikes. *Id.* at 97. Assuming such reasons are given, the trial court then determines whether the prosecutor's purportedly race-neutral reasons are truthful – i.e., whether defendant has established intentional discrimination. *Id.* at 98. In *Miller-El*, 545 U.S. at 239-40, this Court reaffirmed that *Batson* did not render obsolete *Swain*'s analysis of the prosecutor's conduct outside the trial: "Some stated [race-neutral] reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand . . . to 'all relevant circumstances.'" *Id.* (quoting *Batson*, 476 U.S. at 96-97).[4]

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[4] As this Court stated in *Miller-El*, although "the move from *Swain* to *Batson* left a defendant free to challenge the prosecution without having to cast *Swain*'s wide net, the net was not entirely consigned to history, for *Batson*'s individualized focus came with a weakness of its own owing to"

Thus, *Swain*'s focus on a prosecutor's longstanding history of racial discrimination remains relevant to the *Batson* inquiry, even though it is not necessary to prevail on the claim. *See Miller-El*, 545 U.S. at 266 ("If anything more is needed for an undeniable explanation of . . . " the prosecutor's motivations ". . . history supplies it.").

Jefferson Parish prosecutors have historically used peremptory strikes to prevent qualified African-American venirepersons from performing their civic duties as jurors. The Louisiana Supreme Court has reversed a trio of Jefferson Parish cases, twice finding a *Batson* violation and once reversing on other grounds while noting the *Batson* problem. *See, e.g., State v. Harris*, 820 So. 2d 471, 474 (La. 2002) (finding *Batson* violation in capital murder trial where Jefferson Parish prosecutor struck three out of four African Americans, and argued that "*Batson* [was] an old case" changed "some" by subsequent law, and where purportedly "race-neutral" reason for striking an African-American venire person was that he was "a single black male on the panel with no children"); *State v. Jacobs*, 789 So. 2d 1280, 1283 n.2 (La. 2001) (reversing death sentence and conviction on other grounds but criticizing same trial judge who presided over petitioner's trial for failing to "properly address *Batson* challenges" made when prosecutor tried to strike five of five African Americans and succeeded in striking four[5]); *State v. Myers*, 761 So. 2d 498, 500, 503 (La. 2000) (reversing non-capital conviction where trial court erred in failing to address the defendant's *Batson* challenges to the State's peremptory challenges against six of seven African Americans).

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the ease with which discriminating prosecutors could cover their trails with fabricated race-neutral reasons. *Miller-El*, 545 U.S. 239-40.

[5] The number of African Americans struck by the prosecutor may be found by referring to the appellate record. *State v. Jacobs*, No. 1999-KA-1659, Tr. at 1286, 1292-93, 1296, 1301-03, 1455-57 (La.) (appellate record on file in Louisiana Supreme Court).

In capital murder cases such as Snyder's, the problem has been particularly stark. As reflected in available decisions and Louisiana Supreme Court records, Jefferson Parish prosecutors struck all or all but one qualified African-American venirepersons in eleven capital cases, including *Jacobs* and *Harris*. These prosecutions occurred both before[6] and after[7] Allen Snyder's trial. In a twelfth case, the

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[6] *See State v. Seals*, 684 So. 2d 368, 375 (La. 1996) (denying *Batson* challenge in 1993 trial where Jefferson Parish prosecutor struck three black venirepersons, leaving an all-white jury (documentation that jury was all-white contained in Appellant's Brief at 13, and Reply Brief at 6, on file in Louisiana Supreme Court); *State v. Lindsey*, 543 So. 2d 886, 897-98 (La. 1989) (denying *Batson* challenge where all-white jury seated after Jefferson Parish prosecutor struck three qualified black venirepersons); *State v. Durham*, 673 So. 2d 1103, 1113 (La. Ct. App. 1996) (denying *Batson* challenge in 1994 trial where all-white jury seated after Jefferson Parish prosecutor struck three black venirepersons and rejecting argument that two were similarly situated to non-struck white venirepersons under the incorrect rationale that "the mere fact that the state excuses one person with a particular characteristic and not another similarly situated person does not in itself show . . . a mere pretext for discrimination").

[7] *See State v. Bridgewater*, 823 So. 2d 877, 896 (La. 2002) (denying *Batson* challenge where all-white jury seated after Jefferson Parish prosecutor used peremptory strikes to remove two black venirepersons in 1998 trial); *State v. Neal*, 796 So. 2d 649, 654-55 (La. 2001) (denying *Batson* challenge where Jefferson Parish prosecutor used strikes to remove three out of four black venirepersons in 1999 trial); *State v. Taylor*, 781 So. 2d 1205, 1212-13 (La. 2001) (denying *Batson* challenge where Jefferson Parish prosecutor struck five out of six black venirepersons in 1998 trial); *State v. Parker*, 901 So. 2d 513, 521-22 (La. Ct. App. 2005) (denying *Batson* challenge where all-white jury seated after Jefferson Parish prosecutor excluded five of five black venirepersons); *State v. Arceneaux*, No. 2006-KA-2986, Tr. at 1189-90, 1105, 1183, 1184, 1185, 1190 (La. (appeal pending)) (denying *Batson* challenge where Jefferson Parish struck five black venirepersons and all-white jury seated) (appellate record on file in Louisiana Supreme Court); *State v. Lam*, No. 2001-KA-2729, Tr. at 1050-51 (La. (appeal pending)) (denying *Batson* challenge where Jefferson Parish prosecutor struck three of the four qualified black venirepersons and all-white jury seated

prosecutors attempted to strike all but one qualified African American, but the trial judge intervened and ordered that a second African-American venireperson be seated.[8] The Jefferson Parish prosecutor's strikes in these cases are summarized in the following chart:

Case Name	Qualified African-American Venire-persons Struck	Number of African-American Jurors
Harris	3 of 4	1
Jacobs	4* of 5 * prosecutor attempted to strike 5	1
Bridgewater	2 of 2	0
Neal	3 of 4	1
Taylor	5 of 6	1
Seals	3 of 3	0
Durham	3 of 3	0
Lindsey	3 of 3	0

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because defense had previously struck one black venireperson) (appellate record on file in Louisiana Supreme Court).

[8] *See State v. Ball*, 824 So. 2d 1089, 1097, 1119 (La. 2002) (denying *Batson* challenge where ten whites and two African Americans sat on jury where although the trial court found race based decision making by the Jefferson Parish prosecutor after he struck four African Americans, he allowed the prosecutor to "back select" a previously struck African-American woman instead of reseating the improperly struck juror).

Parker	5 of 5	0
Arceneaux	5 of 5	0
Lam	3 of 4	0* *1 struck by defense
Ball	3* of 5 * prosecutor attempted to strike 4	2
TOTAL in 12 Cases:	42 of 49 * prosecutor attempted 44	6

In sum, in 12 capital murder cases, the Jefferson Parish District Attorney sought to strike 44 out of 49 – approximately 90% – of qualified African-American venirepersons (and were unsuccessful only twice).[9] Six out of the 144 petit jurors in these 12 capital cases is 4%, substantially lower than the proportion of African Americans in Jefferson Parish.[10]

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[9] In one additional known capital prosecution, an all-white jury served, but it is not known whether the prosecutor used peremptory strikes to remove qualified black venirepersons. *See State v. Chester*, 724 So. 2d 1276 (La. 1998) (affirming death sentence rendered by all-white jury although there was no *Batson* claim (documentation that jury was all-white contained in Appellant's Brief at 5, on file in Louisiana Supreme Court)).

[10] *See Census 2000*, United States Census Bureau (2000) (available at http://factfinder.census.gov (last visited Aug. 30, 2007) (noting African-American population of Jefferson Parish to make up 17.6% of total in 1990 and 22.9% in 2000).

These numbers are representative of the capital murder prosecutions in Jefferson Parish.[11] After a detailed examination of published cases and available Louisiana Supreme Court records, *amici* can find only one Jefferson Parish capital murder prosecution in which two African-American jurors sat, *see Ball*, 824 So. 2d at 1097, 1119; the remaining trials had no or one African-American juror.

A 2003 statistical study of 390 trials and 10,000 prospective jurors in Jefferson Parish from 1994 to 2002 demonstrates a similar pattern of race-based strikes. *See* Richard Bourke, Joe Hingston, and Joel Devine, *Black Strikes: A Study of the Racially Disparate Use of Peremptory Challenges By the Jefferson Parish District Attorney's Office* (available at Blackstrikes.com) (last viewed on Aug. 30, 2007).[12] The data revealed that prosecutors used peremptory strikes to remove 55% of qualified African-American venirepersons, while peremptorily challenging only 16% of qualified white venirepersons. *Id.* at 6. In his statistical analysis of this data, Professor Joel Devine of the Center for Applied Social Research at Tulane University determined that "there is a racial disparity in the state's use of peremptory challenges and that this disparity is highly significant." *Id.* at 7.

"'Happenstance is unlikely to produce [these] disparit[ies].'" *Miller-El*, 545 U.S. at 241 (noting unlikelihood of similar disparity within single trial) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003)).

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[11] There have been 23 post-*Batson* capital murder trials in Jefferson Parish. *See* Amicus Br. of Louisiana Association of Criminal Defense Lawyers in Supp. of Pet. for Cert., at 16 & nn.42-43. Twenty of those trials resulted in death sentences, including 18 trials where the jury's racial composition was documented. *Id.* Of those 18 trials, 10 had zero black jurors, seven had one black juror, and one had two black jurors. *Id.*

[12] The study is also on file in the Louisiana Supreme Court with the writ application in *State v. Harris*, Sup. Ct. No. 03-KK-3549.

The constitutional injury inflicted by systemic discrimination extends beyond the individual defendants to *amici* and their congregants, who have been prevented "from making a significant contribution to governance on account of [their] race." *Johnson v. California*, 545 U.S. 162, 172 (2005). *See also Smith v. Texas*, 311 U.S. 128, 130 (1940) ("For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." (footnote omitted)).

Important in all trials, the opportunity to participate "in the administration of the law[] as jurors" and to weigh the State's arguments, *Strauder*, 100 U.S. at 308, is crucial in cases where the State uses race-based arguments to obtain a death sentence against an African-American defendant.

Jefferson Parish prosecutors have undermined *amici*'s "confidence in our judicial system." *J.E.B.*, 511 U.S. at 140. *Batson* must mean more than it did to the majority in the court below if African Americans are to be a part of the jury system in Jefferson Parish. Recognition by this Court that the prosecutor wielded his peremptories for the purpose of racial discrimination in Snyder's case would begin the healing necessary before African Americans' confidence in the Jefferson Parish (and Louisiana) criminal justice system may be restored.

B. Jefferson Parish Prosecutors Have Exhibited Racial Insensitivity in their Public Statements and Actions Regarding Capital Cases.

The prosecutor's unique role "transcends that of a adversary: [the prosecutor] 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (quoting *Berger v.*

United States, 295 U.S. 78, 88 (1935)). Instead of representing the community and seeking justice, Jefferson Parish prosecutors have publicly engaged in racially insensitive and offensive behavior regarding capital prosecutions. This behavior further places in context Jefferson Parish prosecutors' disproportionate use of peremptory strikes against African-American jurors, and prosecutor Williams's invocation of O.J. Simpson in closing argument after securing an all-white jury for Snyder's trial.

During an interview with writer Ivan Solotaroff in 1995, Jim Williams and another Jefferson Parish prosecutor joked about wanting to seat Nazis on capital juries.[13] The Nazis, of course, espouse principles of racial hatred and violence. *See, e.g., Jewish War Veterans of U. S. v. American Nazi Party*, 260 F. Supp. 452, 454 (N.D. Ill. 1966). In the same interview with Williams present, the other Jefferson Parish prosecutor was quoted as saying that "even if the murder was black on black," African-American prospective jurors still think of the death penalty as "white man's justice." Solotaroff, *supra* note 13, at 52. In his Jefferson Parish prosecutor's office, Williams showed off a tiny model electric chair holding cut-out faces of five African-American condemned men, every defendant against whom Williams had obtained a death sentence. *Id.* at 51.[14]

On other occasions, Jefferson Parish prosecutors have appeared in capital courtroom proceedings with neckties depicting a grim reaper and a hangman's noose.[15] As a

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[13] *See* Ivan Solotaroff, *The Last Face You'll Ever See: The Private Life of the American Death Penalty* 52 (2001).

[14] A photograph of the model was originally published in Ivan Solotaroff, *The Last Face You'll Ever See*, ESQUIRE, Aug. 1995, at 97.

[15] *See* James Gill, *Ghoulish Neckties Were Just Their Style*, TIMES-PICAYUNE, Jan. 10, 2003, at 7 (Metro Section); Jeffrey Gettleman, *Prosecutors' Morbid Neckties Stir Criticism*, N.Y. TIMES, Jan. 5, 2003, at A14; Joe Darby, *Prosecutors' Choice of Neckties Blasted: Noose, Grim*

prominent African-American federal district court judge has observed, "the noose is among the most repugnant of all racist symbols, because it is itself an instrument of violence. It is impossible to appreciate the impact of the display of a noose without understanding this nation's opprobrious legacy of violence against African-Americans." *Williams v. New York City Hous. Auth.*, 154 F. Supp. 2d 820, 824 (S.D.N.Y. 2001) (Carter, J.) (citation omitted).[16] Not surprisingly, the father of an African-American defendant in one such case called the noose necktie "clearly racist."[17]

The jury serves as an indispensable bulwark against an overreaching prosecutor, particularly when the State seeks to prosecute and execute a member of a minority and acts in a racially insensitive manner. Excluding African Americans from this vital process weakens this protection. It is the antithesis of justice.

C. The Prosecutor Knew that an All-White Jefferson Parish Jury Would Likely Be Responsive to a Racially-Charged "O.J." Argument for Death.

Less than a year before Petitioner's August 1996 trial, a Los Angeles jury acquitted O.J. Simpson. *See, e.g.*, Martin

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Reaper Worn in Murder Case, TIMES-PICAYUNE, Jan. 5, 2003, at 1; Katy Reckdahl, *Ties that Bind: For Courtroom Observers, Recent Reports of Grim Reaper and Noose Neckties in Jefferson Parish Courtrooms are Knotted Up in Issues of Race and History*, GAMBIT WEEKLY, Jan. 14, 2003 (available at http://www.bestofneworleans.com/dispatch/2003-01-14/news_feat.html) (last visited Aug. 30, 2007) (noting that the ties were given to prosecutors for Christmas in 2001 and worn by at least two prosecutors until a defense attorney filed a motion in December of 2002).

[16] A noose could not represent current judicial punishment. Louisiana outlawed execution by hanging in 1941. *See, e.g., State ex rel. Pierre v. Jones*, 9 So. 2d 42, 43 (La. 1942).

[17] Jeffrey Gettleman, *Prosecutors' Morbid Neckties Stir Criticism*, N.Y. TIMES, Jan. 5, 2003, at A14.

Gottlieb, *Not Guilty: The Racial Prism*, N.Y. TIMES, Oct. 4, 1995, at A1. Across the country, in significant numbers, African Americans and whites reacted with diametrically opposed views on the verdict. *Id.* A CBS News poll taken immediately afterward found that roughly 60 percent of whites believed the jury reached the wrong verdict, i.e., that Simpson got away with murder, while 90 percent of blacks believed the jury's verdict was correct. *Id.*[18] Louisianans similarly divided along racial lines.[19]

Due to these stark divisions, urging an all-white jury anywhere in America to avoid another unjust O.J. verdict would be highly inflammatory and inappropriate. This type of argument, however, was especially likely to inflame the passions and prejudices of an all-white Jefferson Parish jury.

Jefferson Parish grew immediately to the west of New Orleans as a "primary destination for white flight," particularly from 1960 to 1980.[20] Once ensconced there, the white majority resorted to racial discrimination and segregation on numerous fronts. *See generally Citizens for a Better Gretna v. City of Gretna, La.*, 636 F. Supp. 1113, 1116 (E.D. La. 1986) ("The historical record of discrimination in the . . . Parish of Jefferson is undeniably clear, and the record suggests it has not ended even now."), *aff'd*, 834 F.2d 496 (5th Cir. 1987). As a Times-Picayune reporter explained,

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[18] *See also* Richard Morin, *Poll Reflects Division Over Simpson Case; Trial Damaged Image of Courts, Races Agree*, WASHINGTON POST, Oct. 8, 1995, at A31 (finding that 80% of African Americans thought the verdict was correct, while 55% of whites believed the verdict was wrong). CNN-TIME MAGAZINE POLL, Oct. 6, 1995 (finding that 88% of African Americans but only 41% of whites believed the jury's verdict was correct).

[19] *See, e.g., NOT GUILTY: Baton Rouge-area reactions range from cheers to disbelief*, THE ADVOCATE, Oct. 4, 1995, at 1A; John Pope, *Some in N.O. Elated, Some Stunned*, TIMES-PICAYUNE, Oct. 4, 1995, at A4.

[20] Donald Phares, *Metropolitan Governance Without Metropolitan Government?* 135 (2004).

"[m]any Jefferson Parish residents simply did not want to be around blacks." Tyler Bridges, *The Rise of David Duke* 143 (1995).

As late as the early 1970's, "[b]lacks were systematically denied access to restaurants, forced to sit in the rear of buses and subjected to separate and unequal facilities." *Citizens for a Better Gretna*, 636 F. Supp. at 1117; *see also Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1114-15 (5th Cir. 1991) (adopting and noting stipulation of parties to history of racial discrimination in Jefferson Parish testified to by expert in *Citizens for a Better Gretna* case).

In 1987, the elected Jefferson Parish Council ordered the construction of a concrete and wood barricade along the parish line to prevent residents from largely black Orleans Parish from entering Jefferson Parish.[21] Black New Orleans residents called the barricade "the Berlin Wall."[22] New Orleans Mayor Sidney Barthelemy, who was African-American and believed that racism was a factor in the decision to erect the barriers, ordered them bulldozed as illegal.[23] The Jefferson Parish Council President, who was white, vowed to rebuild the barriers.[24] He relented only after Louisiana's State Highway Department said that the barriers were illegal.[25]

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[21] *See Barricades to Black Drivers Dismantled*, L.A. Times, Feb. 22, 1987, at 25.

[22] *See New Orleans, Suburb Feud Over Wall*, CHI. TRIB, Feb. 23, 1987, at 5.

[23] *See Suburb Backs Down, Won't Put Walls Up*, L.A. TIMES, Feb. 23, 1987, at 2. *See also* preceding two notes, *supra*.

[24] *Id.*

[25] *Id.*

Jefferson Parish had not remedied its history of racial discrimination by the time of Petitioner's trial in 1996.[26] As recently as 1989, Jefferson Parish voters elected David Duke, a former Grand Wizard of the Ku Klux Klan, to a state house seat.[27] In subsequent gubernatorial and senate elections in 1990 and 1991, Duke carried Jefferson Parish.[28] And the parish had repeatedly reelected a sheriff, Harry Lee, known for pointedly derogatory remarks towards African Americans.[29] Less than a year before Petitioner's trial, "Lee was easily re-elected with 71 percent of the vote in the primary." *Top 10 West Bank Stories of 1995*, TIMES-PICAYUNE, Dec. 31, 1995, at 1F1.

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[26] Although amici could point to persuasive and ample evidence that such racial discrimination continues to this day, *see, e.g.*, Gardiner Harris, *Storm and Crisis: Battling the Storm; Police in Suburbs Blocked Evacuees, Witnesses Report*, N.Y. TIMES, Sept. 10, 2005, at A13, present-day information is of lesser relevance to Snyder's *Batson* claim than the well-known racial animus in Jefferson Parish leading up to the time of the prosecutor's peremptory strikes in 1996.

[27] Frances Frank Marcus, *Winner in Louisiana Vote Takes on G.O.P. Chairman*, N.Y. TIMES, Feb. 20, 1989, at A1.

[28] Leonard Zeskind, *For Duke, Just a Start?*, N.Y. TIMES, Oct. 9, 1990, at A25; Kim Chatelain and Joe Darby, *Jeff Parish Fails Duke in Runoff*, EDWARDS SHARE OF PARISH VOTE JUMPS BY 182%, TIMES-PICAYUNE, Nov. 20, 1991, at A1; David Meeks, *An Ill-Conceived Business Boycott*, TIMES-PICAYUNE, Nov. 24, 1991, at B7.

[29] For example, in 1994, two years before Petitioner's trial, the black community criticized Lee's office when two black men it had arrested and "hog tied" died in custody. Jim Yardley, *Sheriff Rules Louisiana Parish With an Iron Fist But Chinese-American Lawman Denies Racism*, ATL. J. AND CONST., May 1, 1994, at A3. In response, Lee removed a special street crime unit from Avondale, a black neighborhood. *Id.* "'To hell with them,' Lee said at the time. 'I don't need that. I haven't heard one word of support from one black person.'" *Id.* For a similar incident, *see* Frances Frank Marcus, *Louisiana Sheriff Backed after Racial Remark*, N.Y. TIMES, Dec. 23, 1986, at A17.

Jefferson Parish's history of racial discrimination and repeated support for racially divisive candidates and policies provides a probative context for understanding why the prosecutor struck all qualified black venirepersons and compared Snyder, a black man, to O.J. Simpson. This context is critical for at least three reasons.

First, the Louisiana Supreme Court's judgment below threatens one of *Batson*'s crucial policy objectives – maintaining minority confidence in our criminal justice system. *J.E.B.*, 511 U.S. at 128; *Batson*, 476 U.S. at 87. A state's exclusion of minorities from jury service using discriminatory peremptory strikes is always of great concern to the excluded minorities. Jefferson Parish's history of racial discrimination only exacerbates such concerns in Petitioner's case. Not only were qualified African Americans excluded from service – in and of itself hurtful – but they are understandably less likely to have confidence in the legitimacy of a verdict rendered by an all-white jury drawn from Jefferson Parish.

Second, as this Court stated when it first ruled squarely against racial discrimination in jury selection, "[i]t is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Strauder*, 100 U.S. at 309. Ongoing racial discrimination in Jefferson Parish lends tangible substance to these observations. Reaffirming the promises of *Swain* and *Batson* and their progeny remains necessary to guarantee black defendants a fair trial in Jefferson Parish.

Third, under *Batson*, the credibility of the prosecutor's denial of using race-based peremptories is crucial. 476 U.S. at 98. Attention to O.J. Simpson's "trial of the century," and its fallout along racial lines, continued for many months after the October 1995 not-guilty verdict, and

remained a media preoccupation at the time of Snyder's trial.[30] Similarly, Jefferson Parish's frequent strife and support for racially divisive figures such as David Duke were highly publicized. In other words, it "blinks reality"[31] to believe that prosecutor Williams did not know that a substantial number of Jefferson Parish whites would have believed that O.J. Simpson ;ot away with murder. The prosecutor's denial that race was at play when he crafted Petitioner's all-white jury and then urged it to avoid another O.J. verdict is, thus, not credible.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

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[30] Larry Margasak, *Simpson: 'Lord is on My Side' Media Blamed as the Evildoers*, TIMES PICAYUNE, Aug. 29, 1996, at A6; *No Cameras Allowed at O.J.'s Civil Trial*, TIMES PICAYUNE, Aug. 24, 1996, at A2; J.E. Bourgoyne, *Writer: O.J. Trial a Farce that Didn't Rate a Book*, TIMES PICAYUNE, Aug. 17, 1996, at A17.

[31] *Miller-El*, 545 U.S. at 266.